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Supreme Court of the United States

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October Term, 1939
No. 500

STATE OF MINNESOTA,

Petitioner,

vs.

NATIONAL TEA COMPANY AND ALLIED STORES CORPORATION (FORMERLY HAHN DEPARTMENT STORES, INCORPORATED),

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF PETITIONER.

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IN THE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF PETITIONER.

OPINIONS OF THE COURTS BELOW.

The trial court, the State District Court, rendered no opinion in these cases. Its final findings of fact and conclusions of law appear in the record at pages 40 to 54 (National Tea case) and pages 74 to 87 (Allied Stores case).

The opinion of the Supreme Court of the State of Minnesota appears at pages 677 to 684 of the record and is reported in 205 Minnesota Reports, 443-451, and in 286 Northwestern Reporter, 360-364.

STATEMENT AS TO JURISDICTION.

This case comes here under a writ of certiorari granted by this Court to review final judgments of the Supreme Court of Minnesota, the highest court of that state, holding the gross sales portion of the Minnesota chain store tax invalid because in violation of Section 1 of the Fourteenth Amendment. (See Minnesota Supreme Court's opinion, 286 N. W. 360, 362). This brings the case within the provisions of the Judicial Code, Section 237 (b) as amended, 28 United State Code Annotated, Section 344 (b), which reads:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; * * * and the power to review under this paragraph may be exercised as well

where the Federal claim is sustained as where it is denied."

In paragraphs III and XVIII of plaintiff's complaint in the National Tea Company case (R. 4 and 21) and in paragraphs III and XV of plaintiff's complaint in the Allied Stores Corporation case (R. 58-59 and 67) plaintiff alleges that the act is in violation of the following portion of Article XIV, Section 1, of the Amendments to the Constitution of the United States:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These allegations are denied in paragraphs III and XVIII of defendant's answer in the National Tea Company case (R. 32, 35) and in paragraphs III and XV of defendant's answer in the Allied Stores Corporation case (R. 69, 71).

Plaintiffs also contended in their complaints that the Act violates several sections of the state constitution (R. 4, 58-59). As to all of these but one the State District Court held in favor of the validity of the Act (R. 52, 84-85). It did, however, hold the Act to be in violation of Article 9, Section 1 of the state constitution. We will show in the course of this argument that the state question so raised was not of such a character as to deprive this Court of jurisdiction.

The State District Court made findings that the imposition of the gross sales portion of the tax provided by Sec-

tion 2 (b) of the act is "in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States." (National Tea case, Finding 17, R. 50) (Allied Stores case, Finding 17, R. 83.)

The making of this finding was assigned as Error No. 5 in defendant's brief in the Supreme Court of Minnesota (R. 688).

The State District Court made a Conclusion of Law to the effect that the gross sales feature of the Act, as set forth in Section 2 (b) is unconstitutional as being "in violation of Article XIV, Section 1 of the Amendments to the Constitution of the United States." (National Tea case, Conclusion of Law 15, R. 54) (Allied Stores case, Conclusion of Law 14, R. 86). The making of this conclusion of law was assigned as Error No. 6 in defendant's brief in the Supreme Court of Minnesota (R. 688). In its decision in these cases, 205 Minn. 443, 286 N. W. 360 (R. 677), the Supreme Court of Minnesota held the gross sales portion of the tax invalid on the ground that it is in violation of Article XIV, Section 1, of the Constitution of the United States and also in violation of a provision of the State constitution imposing identical restrictions. That the Minnesota Court held the restrictions imposed by the two constitutions to be identical is shown by the following quotation from the court's decision, 286 N. W. 362:

> "Under U. S. Const. Amend. XIV, S. 1, it is provided that, 'No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' Minn. Const. Art. 9, S. 1, provides: 'Taxes shall be uniform upon the same class of subjects. * * *.' In Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102, we held that *these provisions of the Federal and State Constitutions imposed identical restrictions upon the*

legislative power of the state in respect to classification for purposes of taxation." (Italics ours.)

It will be conceded that the State court held the gross sales portion of this chain store tax invalid on the ground that it violates the "equal protection" clause of the Fourteenth Amendment. It may be contended, however, that while these cases were decided on that ground they were also decided on the ground that the gross sales portion of the tax violates that portion of Section 1 of Article 9 of the State Constitution reading: "Taxes shall be uniform upon the same class of subjects." Interpreting this clause the Supreme court of Minnesota has said that "equality of protection includes uniformity of application to the subject of taxation and that our uniformity clause is not more restrictive than the equal protection clause of the Fourteenth Amendment." Reed v. Bjornson, 191 Minn. 254, 261. That court has further construed this clause to mean, operating "equally and uniformly upon all persons in similar circumstances," which obviously carries the same meaning as the equal protection clause of the Fourteenth Amendment. Reed v. Bjornson, supra, 261.

This Court has held in a long line of decisions that "where the record discloses that a judgment of a state court was based, not alone upon a ground involving a Federal question, but also upon another and *independent* ground, broad enough to maintain the judgment, this court will not take jurisdiction to review such judgment". (Italics ours). Doyle v. Atwell, 261 U. S. 590, 592. In case after case, however, this Court has pointed out that to prevent jurisdiction, the State ground must be an independent ground. Doyle v. Atwell, supra, p. 592; Enterprise Irrigation Dis-

trict v. Canal Company, 243 U. S. 157, 164; Nickel v. Cole, 256 U. S. 222, 225; Fox Film Corporation v. Muller, 296 U. S. 207, 210.

This Court has also held that "where the non-federal ground is so interwoven with the other as not to be an independent matter" the Court's jurisdiction is plain. Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164. The point of all these cases is that to prevent jurisdiction the State matter decided must be independent of the Federal matter. A case exactly parallel with the present case on this point is Morehead v. N. Y. ex rel. Tipaldo, 298 U. S. 587, 603, where, (as stated by this Court, p. 603,) the Court of Appeals of New York held the minimum wage act of that State "repugnant to the due process clauses of the State and Federal Constitution." The fact that the New York court held the Act invalid because in violation of the due process clause of the State constitution did not prevent this Court from taking jurisdiction on application for certiorari. It is true that in that case the New York court certified that the Federal constitutional question was present and necessarily passed on. But when the record is clear, as it is in the present case, it speaks for itself. We should note that in the present cases the opinion of the Minnesota court shows as clearly as any certification could that the Federal constitutional question was present, necessarily passed upon, and controlling, first, by stating definitely that the equal protection clause of the Fourteenth Amendment and the uniformity of taxes clause of the State constitution impose "identical restrictions upon the legislative power of the State in respect to classification for purposes of taxation," 286 N. W. 362; secondly, by referring to five cases, (p. 363) each of which involved the validity

of a progressive gross sales tax under the first section of the Fourteenth Amendment, and then saying in conclusion (p. 364):

"We think the five cases to which we have referred have so definitely and finally disposed of the legal problem presented as to make it needless for us to analyze or discuss the great number of other tax cases where the same constitutional question was involved. These being the only cases to which we have been referred directly deciding the question presented, we are of the opinion that we should follow them and it is our duty so to do."

The question presented and decided in every one of these cases was the question whether a progressive gross sales tax violates the equal protection clause of the Fourteenth Amendment and this question was either the sole question or the controlling question in every case. That this is so is shown by the following quotations:

Stewart Dry Goods Co. v. Lewis, supra, p. 554:

"The appellants charge that the statute violates several sections of the constitution of Kentucky and several provisions of the Federal Constitution. We shall not stop to enumerate these, since we must sustain the claim that the classification made by S. 2 denies the appellants the equal protection of the laws assured by the Fourteenth Amendment."

Valentine v. Great Atlantic and Pacific Tea Co., supra, p. 33:

"The District Court, composed of three judges, held that the provision of S. 4 (b) of the statute, imposing a tax based on gross receipts from sales according to an accumulative graduated scale, was invalid under the equal protection clause of the Fourteenth Amendment

of the Constitution of the United States as creating an arbitrary discrimination. * * *"

"The decree is affirmed upon authority of Stewart Dry Goods Co. v. Lewis, 294 U. S. 550."

Ed. Shuster & Co., Inc. v. Henry, 261 N. W. 20, 22:

"Because of the absence of that essential reasonable relation in the respects stated, the tax imposed under section 76.75 (3), Stats., is arbitrary and discriminatory, under the decision in the Stewart case, and therefore section 76.75, Stats., is in violation of the Fourteenth Amendment, U. S. Const., and void."

Lane Drug Stores v. Lee, 11 F. Supp. 672, 673:

"It is unnecessary to discuss subdivision B of section 4 of the act, because the decision in Stewart Dry Goods Co. v. Lewis, * * * fully sustains the contention of plaintiffs that subdivision B of section 4 of the act is so arbitrary, unreasonable, and discriminatory that it denies to these plaintiffs equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution."

Great Atlantic and Pacific Tea Co. v. Harvey, 107 Vt. 215, 177 A. 423:

"The decision (in the Stewart case) is controlling in the instant case. The Supreme Court of the United States is the ultimate authority upon questions arising under the Federal Constitution. * * * If the Kentucky statute offends the Fourteenth Amendment, so does the one in issue before us." 177 A. 427.

The foregoing quotations from the five cases on which the Supreme Court of Minnesota relies makes it clear that the legal problem which it considered was the validity of a

gross sales tax under the equality clause of the Fourteenth Amendment. Accordingly, when the State court says in its final paragraph, 286 N. W. 364, that these five cases have disposed of the legal question, it refers to the question as to the invalidity of the gross sales tax under the Fourteenth Amendment. The court says in effect, that this Federal question was the controlling question in the case.

The State question presented in the present cases is clearly not independent of the Federal question. By the Minnesota Court's own statement, the equal protection clause of the Federal Constitution and the uniformity of taxes clause of the State Constitution "impose identical restrictions upon the legislative power of the State in respect to classification for purposes of taxation." In such a case it necessarily follows that the State court has but one decision to make, namely, whether the act is valid under both constitutions or invalid under both constitutions. Accordingly, this Court having held the Iowa tax on gross sales of chain stores invalid in the Valentine case, on authority of the Stewart case, the Minnesota Court could make no independent decision as to the validity of the Minnesota tax on gross sales of chain stores, except to decide whether said tax and the Kentucky gross sales tax on gross sales of all retail stores were so similar as to be subject to the same objections as to their validity. The Minnesota Court found "the two acts so akin in language and purpose as to make them, in substance and effect, identical," 286 N. W. 362. This decision made, the Minnesota Court was in duty bound to follow the decision of this Court in the Stewart case and the Valentine case and hold the gross sales portion of the Minnesota tax invalid under the equal protection clause of the Fourteenth Amendment and, necessarily, the

two being identical in restrictive effect for purposes of taxation, under the uniformity of taxes clause of the State Constitution. From this it follows that in the present cases the State question was not an independent question, but was controlled by this Court's earlier decision on the identical Federal question. The hands of the Supreme Court of Minnesota were tied by decisions of this Court which we respectfully contend are incorrect.

Under 28 U. S. C. A., S. 344 (b), this Court is given discretionary power to call up for review by certiorari "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; * * * and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied."

It is apparent that under this statute this Court is given unrestricted power to review in any case in which the validity of a state law is challenged in a state court by reason of some provision of the Federal Constitution, whether it is held valid or invalid. It follows that this Court has the power to review the present cases. The only question is whether in the exercise of its discretion it should use that power.

It will be conceded that the purpose of reviewing cases from lower courts is to further the ends of justice by affording an opportunity for the correction of error. In the present cases we contend that the Supreme Court of Minnesota has been compelled to make an incorrect decision in

a case of great importance by reason of the decision of this Court in the Valentine case, supra. By reason of the State court's incorrect decision Minnesota will lose, directly and indirectly, nearly $1,500,000 in taxes. That decision is the direct and inevitable result of this Court's decision in the earlier case.

As long as the decision of this Court in that case stands it will, moreover, be impossible for any of the forty-eight states to levy a progressive chain store tax that can reach chains with enormous sales but few stores. This Court's decision in the Valentine case has placed an unwarranted restriction upon the power of the states to curb the undue expansion of a form of business which, in the opinion of many well-informed authorities, is harmful to the general welfare.

The plaintiffs might have brought an action involving only the question of the validity of this Act under the constitution of the State of Minnesota. Had they done so, no matter what the Supreme Court of the State had held, either for or against them, there would have been no appeal to this Court. They did not choose to do that but invoked the protection of their rights under the Federal Constitution. Had the Court below decided against them they would have had an unquestioned right to seek review by this Court. The state should enjoy a corresponding right to review inasmuch as the lower court's decision was based on the Fourteenth Amendment and controlled by this Court's earlier decision in the Valentine case and the Stewart case.

By granting certiorari this Court has indicated that it has jurisdiction of these cases. We trust the Court will not retreat from that decision.

STATEMENT OF THE TWO CASES.

These two cases have reached this Court under writ of certiorari granted by this Court to review final judgments herein of the Supreme Court of the State of Minnesota.

The National Tea Company, a Delaware corporation conducting business in Minnesota by the system of chain stores, commenced an action in the District Court of Ramsey County, Minnesota, under Chapter 213 of the Laws of Minnesota of 1933, as amended by Chapter 16 of the Extra Session Laws of Minnesota of 1933-1934, the chain store tax law then in effect, to recover from the State of Minnesota, $118,740.08, and interest thereon, on account of chain store taxes paid under said act (R. 39).

The Allied Stores Corporation (at the time of the commencement of the action known as Hahn Department Stores, Incorporated), another foreign corporation conducting business in Minnesota by the system of chain stores, commenced an action in the same court to recover from said State the sum of $57,827.63, and interest thereon, on account of chain store taxes paid under said act (R. 73).

The two cases involving identical questions of law and, for the most part, identical questions of fact, were consolidated and tried together before said district court and presented together on appeal to the Supreme Court of Minnesota.

In each case plaintiff alleged in its complaint that the Act was invalid on the ground that it violated Section 1 of the Fourteenth Amendment to the Constitution of the United States and also certain provisions of the State Constitution (R. 6-7, 93-94). The alleged violation of the Minnesota constitution will be referred to again in that por-

tion of this brief pertaining to the jurisdiction of this Court and there shown to be of such character as not to deprive this Court of jurisdiction.

The Act levies a composite occupational tax consisting of two portions, based respectively on the number of stores in the chain and on the total sales made by the chain. Each plaintiff brought action to recover both portions of the tax paid.

The State District Court held that portion of the Act valid which levied that portion of the tax based on the number of stores in the chain and held invalid that portion of the tax measured by total gross sales. On motion of plaintiffs (R. 513, 535) the first decisions were amended (R. 40-54, 74-87), the amended decisions altering certain findings of fact and certain conclusions of law.

Judgment was entered for National Tea Company in the sum of $88,214.92 (R. 55) and for Allied Stores Corporation in the sum of $72,346.61 (R. 87) and appeals were taken by the State to the Supreme Court of Minnesota (R. 55, 87-88). The two cases were argued together before said court. The court rendered its decision upholding the judgments of the State District Court and final judgments were entered in the State Supreme Court on June 27, 1939 (R. 685).

Extensions of time to apply to this Court for certiorari were granted by justices of this Court, extending the time from September 27 to November 6, 1939. The State's petition for certiorari was docketed in this Court on November 3, 1939 (R. 704). Certiorari was granted by this court on December 11, 1939.

STATEMENT OF FACTS.

On April 2, 1933, the governor of Minnesota approved an act passed by the state legislature imposing an occupational tax on "conducting business by the system of chain stores." This act is Chapter 213 of the Session Laws of Minnesota of 1933 (R. 22-30). Hereafter in this brief this statute as amended will be referred to as "the Act." This act is quoted in full in the appendix to this brief as Exhibit A.

ANALYSIS OF THE PERTINENT PROVISIONS OF THE ACT.

The act levies a progressive occupational tax upon each person conducting a business within Minnesota by the system of chain stores.

Definitions.

The act defines "person" to include individuals, trusts, associations, joint stock companies, corporations and firms, however organized and whatever the plan of operation. (Sec. 1 (a).

The act defines "store" to mean "any fixed place at which business is conducted even if said place is at the same time being used for other purposes." (Sec. 3).

"Conducting a business by the system of chain stores" is defined to mean "conducting such business from two or more stores under a single or common ownership, supervision or management." Two or more stores are declared to be under a single or common ownership, supervision or

management "if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishments, or if any part of the gross revenues, net revenues, or profits, from any such stores or mercantile establishments shall directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit of any single person or any group of persons having a common interest therein." (Sec. 3).

The Tax Levied.

The tax consists of two portions: A specific amount, progressive in character, based on the number of stores in the chain, provided for in Section 2 (a) of the Act, and a second amount, also progressive in character, based on the combined gross sales of all the stores in a chain in excess of one, provided for in Section 2 (b) of the Act.

Section 2 (a) of the Act levies a progressive occupational tax on each chain store organization conducting business within the state, based on the number of stores under a single or common ownership, supervision, or management, as follows:

(1) $5 for each stores in excess of one but not in excess of 10.

(2) $15 for each store in excess of 10 but not in excess of 20.

(3) $35 for each store in excess of 20 but not in excess of 30.

(4) $65 for each store in excess of 30 and not in excess of 40.

(5) $105 for each store in excess of 40 and not in excess of 50.

(6) $155 for each store in excess of 50.

Section 2 (b) of the Act levies a progressive tax on said chain store organizations measured by the amount of gross sales made in Minnesota, as follows:

(1) 1/20 of one per cent on that portion of gross sales not in excess of $100,000.

(2) 2/20ths of one per cent on that portion of the gross sales in excess of $100,000 but not in excess of $200,000.

(3) 3/20ths of one per cent on that portion of the gross sales in excess of $200,000 and not in excess of $300,000.

(4) 4/20ths of one per cent on that portion of the gross sales in excess of $300,000 and not in excess of $400,000.

(5) 5/20ths of one per cent on that portion of the gross sales in excess of $400,000 and not in excess of $500,000.

(6) 6/20ths of one per cent on that portion of the gross sales in excess of $500,000 and not in excess of $600,000.

(7) 8/20ths of one per cent on that portion of the gross sales in excess of $600,000 and not in excess of $700,000.

(8) 10/20ths of one per cent on that portion of the gross sales in excess of $700,000 and not in excess of $800,000.

(9) 12/20ths of one per cent on that portion of the gross sales in excess of $800,000 and not in excess of $900,000.

(10) 15/20ths of one per cent on that portion of the gross sales in excess of $900,000 and not in excess of $1,000,000.

(11) One per cent on that portion of the gross sales in excess of $1,000,000.

Section 4 of the Act exempts from the tax the gross sales of one store selected by the taxpayer.

Exemptions Not in Issue Here.

Various exemptions are provided for in the act. The validity of these was attacked in plaintiff's complaints. They were in issue before the State District Court but they are not in issue here for the reason that the State District Court found them to be valid and plaintiffs have taken no appeal (R. 52-53, 85-86).

Authority to Sue the State.

Authority to bring this action is given by the Extra Session Laws of Minnesota, 1933-1934, Chapter 16. This act is printed in full in the appendix to this brief as Exhibit B.

NATURE OF THE TAX.

As to the nature of the tax the State District Court found that "The act imposes a composite *occupational tax* upon persons engaged in conducting business within the state by

the system of chain stores." (R. 51, 84). As plaintiffs did not appeal these findings stood unchallenged before the Supreme Court of Minnesota and stand unchallenged here. (Italics ours.)

AMOUNT OF TAXES COLLECTED UNDER THE ACT.

Collections of taxes under this act have been as follows: (R. 43, 77).

For the last half of 1933:	
Specific tax	$ 43,060.00
Gross Sales tax	137,764.12
For the year 1934:	
Specific tax	42,350.00
Gross sales tax	358,786.33
For the year 1935:	
Specific tax	37,190.00
Total	$619,150.45

CLASSIFICATION OF TAXPAYERS.

306 chains reported in 1934. The State District Court's findings classifies these chains as follows (R. 43, 77):

2-store chains	151
3-store chains	56
4-store chains	24
5—10 stores	47
11—20 stores	17
21—50 stores	7
51 stores or more	4

With respect to volume of sales, according to the findings, said 306 chains reported sales as follows (R. 43, 77):

Aggregate annual sales less than $10,000..... 4
Aggregate sales $10,000 to $25,000.....14
Aggregate sales $25,000 to $50,000.....35
Aggregate sales $50,000 to $100,000.....58
Aggregate sales $100,000 to $200,000.....74
Aggregate sales $200,000 to $300,000.....28
Aggregate sales $300,000 to $1,000,000.....78
Aggregate sales $1,000,000 to $4,000,000.....11
Aggregate sales over $4,000,000..... 4

COMPARISON OF SALES BY CHAIN STORES AND SINGLE STORES IN 1929 AND 1933, SHOWING GROWTH OF SALES BY CHAIN STORES.

The State District Court found that in 1929 and 1933 the proportionate volume of retail business done by chains and single stores in Minnesota was as follows (R. 44, 78):

CHAINS.

1929 ..... 13.5%
1933 ..... 17.8%

INDEPENDENTS.

1929 ..... 79.3%
1933 ..... 76.8%

For the entire United States, according to the findings, the figures were as follows (R. 44, 78):

CHAINS.

1929	20 %
1933	25.2%

INDEPENDENTS.

1929	77.5%
1933	71.2%

It is apparent that during the four years immediately preceding the enactment of the Act there had been a marked trend in the State of Minnesota and in the United States toward the elimination of independent stores by chain stores.

ADVANTAGES IN MERCHANDISING ENJOYED BY CHAIN STORES.

The State District Court found that chain stores enjoy sixteen substantial advantages in merchandising over independent stores (R. 45-46, 78-80). These are set forth in full under point 2 and need not be stated here.

These advantages are shown in the Argument to be of such character that they must necessarily increase with increases in the total sales of the chain.

NET PROFITS GENERALLY INCREASE WITH AN INCREASE IN THE SIZE OF THE CHAIN.

The State District Court found as follows:

> "The volume of sales per store in different kinds of business varies considerably and there (fol. 71) are considerable variations in average sales per store and in average profits per store in chain store groups selling substantially the same kinds of merchandise, but generally the chain store groups having the largest number of stores make a larger profit than chain store groups selling substantially the same kind of merchandise and having a smaller number of stores. Generally, but by no means always, profits per chain store in the same line of business tend to increase with the number of stores in a chain."

UNFAIR METHODS OF COMPETITION USED BY CHAIN STORES.

The State District Court found as follows (R. 46, 80):

> "In the past prior to the pasisng of the unfair trade practices act in Minnesota in 1937 chain stores have injured competitors and extended their own business by the use of loss leaders."

The District Court also found that "The chain store groups receive substantial special rebates and advertising allowances generally not granted to independent stores." (R. 45, 679). This is now recognized to be an unfair method of competition. Defendant's Exhibits 3, 5, 8, 9, 10, 12, 12a, 12b, 12c, 12d, 13, 14, 14a, 14b, 15, 16, 17 and 18 (R. 566-577) show that the granting of special secret rebates to National Tea Company is the common practice of a large

number of the manufacturers and producers with which it deals and is followed to such an extent that it places weaker competitors, whether independent or chain, under a great handicap.

EFFECTS INJURIOUS TO THE GENERAL WELFARE PRODUCED BY CHAIN STORES.

Not only did the State District Court find that chain organizations have used unfair methods of competition, but it found that the chains enjoy sixteen substantial advantages in merchandising over single stores. Possessing these advantages the chains proceeded to use them to crowd out weaker competitors. In its first decision the State District Court found that the development of chain stores has had many effects injurious to the general welfare of which the following seem especially important (R. 508, 530-531):

1. It has driven independent stores out of business and taken over a larger and larger portion of the field of retail merchandising.

2. It has driven out of business a considerable number of wholesalers and added considerably to unemployment and considerably lessened the taxable value of the property of the state.

3. It has greatly reduced the number of traveling salesmen and thereby added to unemployment.

Mr. Landin testified that under his management the National Tea Company grew from a chain of 12 or 13 stores to one of over 200. He testified that after a new store had been opened, the company would use the loss leader method to bring in trade, that is, it would cut prices on certain items, such as flour, sugar and soap, to about actual cost

without overhead included. This, he testified, proved to be so effective that many of the chain's competitors were driven out of business. (R. 354-355). Mr. Landin testified that substantially the entire business of the larger chains in Minnesota was withdrawn from the local jobbers, causing many of them to go out of business, and that as the jobbing houses went out of business, many traveling salesmen lost their jobs, thereby adding to unemployment. (R. 361-362).

In finding the above injuries to the general welfare produced by chain stores the State District Court gave proper recognition to uncontroverted evidence bearing on the police power purposes of the Act. On motion of the plaintiffs this finding was omitted from the final decision and we assigned this action as error. It is true, however, that a substantial body of findings remains in the final decision to show the police power purposes of the Act. (R. 514, 536, 686-687, 689-691).

FACTS APPLICABLE SOLELY TO NATIONAL TEA COMPANY.

We quote from the State District Court findings:

"The plaintiff is a corporation organized under the laws of the State of Delaware, and is and for many years has been engaged in the State of Minnesota in conducting a retail grocery and meat business by the system of chain stores as defined by the act, and if the act be valid is subject to the tax thereby imposed.

"Plaintiff transacts business in the states of Minnesota, North Dakota, South Dakota, and Wisconsin. By far the greater number of its stores are located in Minnesota. On July 1, 1935, of a total of one hundred forty-

seven (147) stores one hundred twenty-two (122) were located in Minnesota. Its total gross sales in the state were in the last six months of 1933, $2,900,760.00, in 1934, $5,192,250.00, and in 1935, $5,428,978.83. From 1923 to 1929 it had a rate (fol. 76) of net profit in percentage of gross sales on its Minnesota business as follows:

Year	Percentage
1923	2.94
1924	4.39
1925	2.34
1926	2.51
1927	2.48
1928	.54
1929	1.48

"For the years 1930 to 1934 it suffered a net loss on its Minnesota business in the following percentages:

Year	Percentage
1930	2.86
1931	2.78
1932	.26
1933	1.83
1934	1.97

"These profit and loss figures correspond almost exactly with the profit and loss figures of the plaintiff on its entire business within and without the State of Minnesota."

"The stores of the plaintiff are distributed generally throughout the state, and are operated in both large and (fol. 77) small cities and towns. Generally speaking, the stores are operated in direct competition with stores in the same line of business operated by other chains, by the members of voluntary chains, and by owners of single stores. Commonly in plaintiff's store location are found competing stores involving all three

types of operation. The competing chains are of various sizes as measured either by number of stores or aggregate gross sales. The result has been that these competitors have been subject to and have paid taxes under the act at various rates, both as to the specific and gross sales tax features. Thus an analysis of the taxes paid by the plaintiff and twenty-two of its principal chain competitors for the year 1934 shows that the gross sales tax average or composite rates paid by the competitors varied from .05 per cent to .85 per cent as compared with the rate of .87 per cent paid by plaintiff. The maximum rates varied from 1/20 of one per cent to one per cent, the latter being the maximum rate paid by plaintiff. The specific tax rates (in percentage of gross sales) of plaintiff's competitors ranged from .0001 per cent to .15 per cent, as compared with the plaintiff's rate of .36 per cent. The total rates of the two taxes combined varied from .056 per cent to .94 per cent for plaintiff's competitors compared with 1.23 per cent for plaintiff."

"On or about July 10, 1933, the Tax Commission of the State of Minnesota assessed a specific tax against the plaintiff for the last half of the year 1933 in the sum of $19,760.00, and on or about July 20, 1934, assessed a specific tax against the plaintiff for the year 1934 in the sum of $16,505.00 and a gross sales tax for the last half of the year 1933 in the sum of $21,877.67, and on or about January 20, 1935, assessed a specific tax against the plaintiff for the year 1935 in the sum of $14,180.00 and a gross sales tax for the year 1934 in the sum of $45,222.51, making a total amount of tax assessed against the plaintiff under said act of $117,545.18.

"The Auditor and Treasurer of said defendant demanded of plaintiff payment of each of said sums following the assessment of the same and threatened to enforce

collection and payment thereof by levy upon and sale of plaintiff's personal property in the state.

"Under such threat in each instance and under protest plaintiff paid the taxes so assessed as follows:

> On or about January 20, 1934, specific tax for the last half of the year 1933 in the sum of $19,760.00, together with interest thereon in the sum of $1,194.90, and a gross sales tax for the last half of the year 1933 in the sum of $21,877.67, and specific tax for the year 1934 in the sum of $16,505.00, and on or about March 3, 1935, a specific tax for the year 1935 in the sum of $14,180.00 and gross sales tax for the year 1934 in the sum of $45,222.51, making a total amount of tax paid by plaintiff under said act, with interest, of $118,740.08." (R. 48-49).

The Court will note that National Tea Company sustained losses on its business only during depression years, 1930 to 1934, and made substantial profits during the normal years, 1923 to 1929.

FACTS APPLICABLE SOLELY TO ALLIED STORES CORPORATION.

We quote from the State District Court's findings of fact:

"The plaintiff is a corporation, and during and since 1929 has been the owner of all the capital stock of The Golden Rule, Inc. and L. S. Donaldson Company, corporations organized under the laws of the State of Minnesota, and if the Act be valid the plaintiff is subject to the tax thereby imposed. At the commencement of this action the name of the plaintiff was Hahn Department Stores, Incorporated (fol. 144). Since then the name of the plaintiff has been changed to Allied Stores Corporation. Since 1929 and before, The Golden Rule, Inc. operated a retail department store in the city of Saint Paul, Minnesota, and L. S. Donaldson Company operated a retail department store in the city of Minneapolis, Minnesota.

"From 1929 to 1934 the L. S. Donaldson Company and The Golden Rule, Inc. had a rate of net profit in percentage of gross sales as follows (Profit is indicated by 'P' and Losses by 'L'):

Year	L. S. Donaldson Company	The Golden Rule, Inc.
1929	L. 10.11	L. 1.26
1930	L. 7.48	P. 0.51
1931	L. 9.02	P. 0.55
1932	L. 13.27	L. 3.97
1933	L. 8.10	P. 0.17
1934	L. 3.25	L. 1.30

"The total result of the six years' operations by The Golden Rule, Inc. was a net loss.

"The average net profit or loss ratios of department stores generally for the years 1932, 1933 and 1934 were

as follows, the stores being grouped according to sales volume per store:

Sales Volume	1932	1933	1934
$500,000 to $1,000,000	L. 7.9	L. 0.7	P. 1.3
$1,000,000 to $2,000,000	L. 6.6	P. 0.4	P. 0.8
$2,000,000 to $5,000,000	L. 5.3	L. 0.8	P. 0.1
$5,000,000 to $10,000,000	L. 5.5	L. 1.5	P. 0.4
Over $10,000,000	L. 6.1	L. 1.1	L. 0.6"

"'On or about July 15, 1933, the Tax Commission of the State of Minnesota assessed a specific tax against the plaintiff, Allied Store Corporation, the name of which was then Hahn Department Stores, Incorporated for the year 1933 in the sum of $5.00 and on or about January 20, 1934, assessed a specific tax against the plaintiff for the year 1934 in the sum of $5.00 and a gross sales tax for the last six months of the year 1933 in the sum of $16,910.25, and on or about January 20, 1935, assessed a specific tax against the plaintiff for the year 1935 in the sum of $5.00 and a gross sales tax for the year 1934 in the sum of $40,902.38, making a total of taxes assessed against the plaintiff under the said act of $57,827.63.

"The Auditor and Treasurer of said defendant demanded of plaintiff payment of each of said sums following assessment of the same and threatened to enforce collection and payment thereof by levy upon and sale of plaintiff's personal property in the State.

"Under such threat in each instance and under protest plaintiff paid the taxes so assessed as follows:

On or about January 22, 1934, specific tax for the last half of the year 1933 in the sum of $5.00, together with interest in the sum of thirty-five cents, and specific tax for the (fol. 148) year 1934 in the amount of $5.00 and a gross sales tax for the last half of the year 1933 in the amount of $16,910.25, and on or about January 23, 1935, a specific tax for the year 1935 in the sum of

$5.00 and a gross sales tax for the year 1934 in the sum of $40,902.38, making a total amount of tax paid by plaintiff under said Act, with interest of $57,827.98." (R. 83-84).

It is a matter of common knowledge that, except for the first part of 1929, all of the years from 1929 to 1934, inclusive, during which losses were incurred by the Minneapolis, Minnesota, store of Allied Stores Corporation, were depression years, when businesses of all kinds were sustaining losses. Even so it is clear that the experience of the Minneapolis store was altogether exceptional in this chain, for plaintiff's Exhibit O shows that during 1933 the 27 stores of Allied Stores Corporation, then known as Hahn Department Stores, made a small net profit and during 1934 this profit rose to 1.41 per cent of its $70,828,100 in sales, or $998,676.21. (R. 221, 650-651).

Additional facts will be presented at appropriate places in the argument.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

All of the assigned errors will be urged, these being as follows:

1.

The Supreme Court of Minnesota erred in holding that the gross sales portion of the Minnesota chain store tax is arbitrary, unreasonable, unequal and discriminatory and for that reason in violation of the first section of the Fourteenth Amendment and the uniformity of taxes clause of Section 1 of Article 9 of the Minnesota Constitution.

2.

The Supreme Court of Minnesota erred in considering only the revenue aspects of this tax and in failing to consider that this tax was levied also for the police power purpose of restraining the undue expansion of chain stores.

3.

The Supreme Court of Minnesota erred in failing to hold that the development of chain store groups in Minnesota has had many effects injurious to the general welfare, among (fol. 2164) which are the following:

(1) By reason of the advantages of chain stores over independent stores, chain stores throughout Minnesota have gradually been driving independent stores out of business and gradually been taking over a larger and larger portion of the total field of retail sales made within the state.

(2) The development of chain store groups in Minnesota has driven out of business a considerable number of jobbers and wholesale houses within the state and thereby added considerably to unemployment and considerably lessened the value of the taxable property within the state.

(3) It has greatly reduced the number of traveling salesmen and thereby added to unemployment.

(4) It has caused farmers throughout the state to find less ready market for their fruit and vegetable products.

(5) Money has been withdrawn from banks in the villages and smaller cities where chain stores have operated and has been concentrated in the larger cities, thereby weakening the banking structure in rural communities.

A chain store group with a comparatively small number of stores is less injurious to the general welfare in the respects set forth in this paragraph than a chain store group with a large number of stores. The tendency is for the injury to the general welfare to increase with an increase in the number of stores in a chain.

4.

The Supreme Court of Minnesota erred in failing to hold that the composite chain store tax levied by the Act is an appropriate and valid measure to raise revenue and counteract the social and economic ill effects produced by the undue expansion of chain stores.

5.

The Supreme Court erred in holding that the gross sales (fol. 2165) tax is laid as excise upon individual sales, and that the sale of a given quantity of goods by a chain with large gross sales is the same act as the sale of the same quantity of goods by a chain with small gross sales.

6.

The Supreme Court of Minnesota erred in holding that the gross sales tax is not a privilege tax.

7.

The Supreme Court of Minnesota erred in holding that the amount of the gross sales portion of this chain store tax bears no relation to the value of the privilege granted.

8.

The Supreme Court erred in holding that there is no constant or uniform relation between the volume of gross sales and the amount or rate of net profit.

9.

The Supreme Court of Minnesota erred in holding that the classification of chain stores on the basis of volume of gross sales does not rest upon a rational relation to the purposes of the Act.

Wherefore, on account of the errors hereinbefore assigned, appellant prays the Supreme Court of the United States to issue its writ of certiorari herein to the end that the judgments herein of the Supreme Court of the State of Minnesota dated June 27, 1939, may be reviewed by said court.

The foregoing errors will be urged under the following points:

SUMMARY OF ARGUMENT.

POINT 1.

A state may properly levy a tax for the dual purpose of raising revenue and to promote its social and economic welfare.

Authorities on law:

Sonzinsky v. United States, 300 U. S. 506; 57 S. Ct. 554; 81 L. Ed. 772.

Pacific American Fisheries v. Alaska, 269 U. S. 269; 46 S. Ct. 110; 70 L. Ed. 270.

Child Labor Tax Case, 259 U. S. 20; 42 S. Ct. 449; 66 L. Ed. 817.

Great Atlantic and Pacific Tea Company v. Grosjean, 301 U. S. 412; 57 S. Ct. 772; 81 L. Ed. 1193.

Fox v. Standard Oil Company, 294 U. S. 87; 55 S. Ct. 333; 79 L. Ed. 780.

Alaska Fish Co. v. Smith, 255 U. S. 44; 41 S. Ct. 219; 65 L. Ed. 489.

Magnano v. Hamilton, 292 U. S. 40; 54 S. Ct. 599; 78 L. Ed. 1109.

POINT 2.

The Minnesota chain store tax was laid for the dual purpose of raising revenue and to promote its social and economic welfare.

Authorities on law:

Borden's Farm Products Co. v. Baldwin, 293 U. S. 194; 55 S. Ct. 187; 79 L. Ed. 1679.

Authorities on fact:

Willard Thorp, Editor of Dun's Review, "Changing Distribution Trends", printed in American Economic Review, Vol. 29, pp. 75-84, March, 1939. Reprinted in Chain Stores and Legislation, compiled by Daniel Bloomfield.

Charles F. Phillips, assistant professor of marketing at Colgate University, Printer's Ink, Dec. 2, 1937; reprinted in "Chain Stores and Legislation," a book compiled by Daniel Bloomfield. See p. 143 in Bloomfield's book.

Bulletin No. 1, Twentieth Century Fund, reprinted in Bloomfield's book, "Chain Stores and Legislation." See p. 100.

Alfred Buehler, "The Incidence of Chain Store Taxes," Journal of Marketing for January, 1937. Reprinted in Daniel Bloomfield's, "Chain Stores and Legislation." See p. 45.

POINT 3.

The classification of chain stores for taxation on the dual basis of number of stores and gross sales is reasonable and valid under the equal protection clause and the due process clause of the Fourteenth Amendment.

Classification for the purpose of taxation is permissible.

Authorities on law:

Brown Foreman Co. v. Kentucky, 217 U. S. 563; 30 S. Ct. 578; 54 L. Ed. 883.

Capacity to pay taxes increases with the size of the business measured in terms of total sales.

Authorities on fact:

Harvard University Bureau of Business Research, bulletins prepared under direction of Carl N. Schmalz, Assistant Professor of Marketing in Harvard University 57

Bulletin No. 74, Operating Expenses of Department Stores and Departmentized Specialty Stores in 1927 57

Bulletin No. 78, Operating Expenses of Department Stores in 1928 64-65

Bulletin No. 83, Operating Expenses of Department Stores and Departmentized Specialty Stores in 1929 58-59

Bulletin No. 85, Same for 1930 ..... 60-62, 66

Bulletin No. 99, Expenses and Profits of Food Chains in 1934 66-67

Bulletin No. 100, Operating Results of Department and Specialty Stores in 1935.....65-66

Slight differences between the subjects taxed are sufficient to sustain classification.

Authorities on law:

Rast v. Van Deman, 240 U. S. 342; 36 S. Ct. 370; 60 L. Ed. 679.

Cargill Co. v. Minnesota, 180 U. S. 452; 21 S. Ct. 423; 45 L. Ed. 619.

Quong Wing v. Kirkendall, 223 U. S. 59; 32 S. Ct. 192; 56 L. Ed. 350.

Bradley v. Richmond, 227 U. S. 477; 33 S. Ct. 318; 57 L. Ed. 603.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61; 33 S. Ct. 441; 57 L. Ed. 730.

State ex rel. Chase v. Minnesota Tax Commission, 135 Minn. 205; 160 N. W. 498.

Raymond v. Holm, 165 Minn. 215; 206 N. W. 166.

Apartment Owners Association v. City of Minneapolis, 191 Minn. 365; 254 N. W. 443.

Reed v. Bjornson, 191 Minn. 254; 253 N. W. 102.

This Court has upheld taxes laid upon a graduated basis.

Authorities on law:

State Board of Tax Commissioners v. Jackson, 283 U. S. 527; 51 S. Ct. 540; 75 L. Ed. 1248.

Great Atlantic and Pacific Tea Company v. Maxwell, 284 U. S. 575; 52 S. Ct. 26; 76 L. Ed. 500.

Liggett Co. v. Lee, 288 U. S. 517; 53 S. Ct. 481; 77 L. Ed. 929.

Fox v. Standard Oil Co., 294 U. S. 87; 55 S. Ct. 333; 79 L. Ed. 780.

Great Atlantic and Pacific Tea Company v. Grosjean, 301 U. S. 412; 57 S. Ct. 772; 81 L. Ed. 1193.

Pacific Fisheries v. Alaska, 269 U. S. 269;

The chain store taxes sustained by the Supreme Court of the United States are the same in principle as the Minnesota tax. The operation of the Minnesota tax with its dual measure of size is more nearly equitable than the operation of the specific tax alone.

Authorities on fact:

Summary of the Minnesota chain store tax records appearing in plaintiff's Exhibit A.

The Minnesota tax with its dual measure of size is sustainable for the same reasons as a tax on chain store taxes based only on number of stores.

Economies of large scale buying available to the larger chains.

Economies in advertising available to the larger chains.

Economies in financing available to the larger chains.

Economies in warehousing available to the larger chains.

Advantage of the larger chains in advertising rebates.

Advantages of the larger chains in distributing goods to their stores.

The combined rates of the Minnesota composite tax are not confiscatory.

The existence of differences in profit margins between different chains does not render this tax arbitrary.

The sale of a given quantity of goods by a chain with large total sales differs substantially from the sale of the same quantity of goods by a smaller chain. This difference may properly be made the basis of classification for the purpose of taxation.

POINT 4.

A state may use its taxing power to restrain the growth of monopolies.

Authorities on law:

Crescent Oil Company v. Mississippi, 257 U. S. 129; 66 L. Ed. 166; 42 S. Ct. 42.

Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412; 57 S. Ct. 772, 81 L. Ed. 1193.

POINT 5.

This Court's decision in the case of Valentine v. Great Atlantic and Pacific Tea Company, 299 U. S. 32, is erroneous and should be overruled.

Authorities on law:

State Board of Tax Commissioners v. Jackson, 283 U. S. 527;

Liggett Co. v. Lee, 288 U. S. 517;

Fox v. Standard Oil Co., 294 U. S. 87;

Valentine v. Great Atlantic and Pacific Tea Company, 299 U. S. 32;

Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412.

POINT 6.

This Court is asked to reconsider and overrule its decision in the case of Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, if it shall deem the decision in that case controlling in these.

Authorities on law:

Stewart Dry Goods Co. v. Lewis, 294 U. S. 550; 55 S. Ct. 525; 79 L. Ed. 1054.

Moore v. State Board of Charities and Corrections, 239 Ky. 729; 40 S. W. (2d) 349.

POINT 7.

The decision of the Supreme Court of Minnesota in the present cases is not in harmony with the decisions of this Court:

Authorities on law:

State Board of Tax Commisioners v. Jackson 283 U. S. 527; 51 S. Ct. 540; 75 L. Ed. 1248..

Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481; 77 L. Ed. 780.

Fox v. Standard Oil Co., 294 U. S. 87; 55 S. Ct. 333; 79 L. Ed. 780.

Valentine v. Great Atlantic and Pacific Tea Co., 299 U. S. 32; 57 S. Ct. 772; 81 L. Ed. 1193.

Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412; 57 S. Ct. 772; 81 L. Ed. 1193.

POINT 8.

There is a reasonable relationship between this tax and the purposes of the Act.

Authorities on law:

Fox v. Standard Oil Co., 294 U. S. 87; 55 S. Ct. 333; 79 L. Ed. 780.

Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412; 57 S. Ct. 772; 81 L. Ed. 1193.

POINT 9.

The Minnesota Chain Store Tax is a privilege tax.

POINT 10.

This Court should render a final decision.

Authorities:

Reed v. Bjornson, 191 Minn. 254, 261; 253 N. W. 102.

National Tea Co. v. State, Allied Stores Corporation v. State, 205 Minn. 443, 447; 286 N. W. 360, 362.

Lake Superior C. I. Mines v. Lord, 271 U. S. 577, 581.

POINT 1.

A state may properly levy a tax for the dual purpose of raising revenue and to promote its social and economic welfare.

The police power is an inherent power of the states and should not be interfered with by the federal courts except in cases of manifestly arbitrary exercise. In Powell v. Pennsylvania, 127 U. S. 678, this Court said:

> "It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, *it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states.*" (Italics ours)

When a state legislature levies a tax it generally exercises both its taxing power and its police power: its taxing power, in passing an act to raise revenue, and its police power in various ways, such as, by selecting certain subjects for taxation and exempting others, and thereby encouraging certain types of enterprise by making them tax exempt. Such an exemption is written into the Minnesota Constitution, Article 9, Section 1, where it is provided that all seminaries of learning, churches and church property, and institutions of public charity shall be exempt from taxation. In granting this exemption the State exercises its police power to encourage the development of that which it exempts from the burden of a tax. Luxuries are taxed more heavily than necessities with the thought that while there must be revenue the general welfare requires that taxes fall less heavily upon those things which men must have in order to live. Minnesota taxes homesteads less heavily than other real property for the reason that home ownership makes for a better citizenship and should be encouraged. Most states tax liquor heavily in order to discourage excessive consumption. Legislatures often tax certain commodities at prohibitive rates in order to discourage their production and thereby encourage the use of other commodities. Such is the tax on oleomargarine. The United States once levied a prohibitive tax on state bank notes in order to drive them out of circulation.

In the case of Sonzinsky v. United States, 300 U. S. 506, 513, Mr. Justice Stone points out that every tax has police power aspects. We read:

> "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed."

To the same effect is the statement by Mr. Justice Holmes in Pacific American Fisheries v. Alaska, 269 U. S. 269, 277:

> "Any tax is a discouragement and therefore a regulation so far as it goes * * *."

This Court has long recognized that laws may properly be enacted for the dual purpose of raising revenue and for some police power purpose. In the Child Labor Tax Case, 259 U. S. 20, 38, this Court, speaking by Mr. Chief Justice Taft, said:

> "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous."

Nowhere has this dual purpose in taxation been more clearly stated than in two of the chain store tax cases passed upon by this Court. In Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, Mr. Justice Roberts, speaking for the majority of the Court, said (pp. 425-426):

> "Our decision need not, however, rest on conceptions of subject, measure, and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction. * * * In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate it may per-

mit upon condition that a fee be paid in return for the privilege, and such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities. Taxation may be made the implement of the exercise of the state's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful."

There could be no clearer recognition of a state's right to curb the undue expansion of chain stores than the following paragraph of the Court's opinion (p. 426):

"If in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation."

To the same effect is the statement by Mr. Justice Cardozo in the majority opinion in the case of Fox v. Standard Oil Company, 294 U. S. 87, 100-101, which reads:

"A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of its component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held, (citing cases). Not only

may it do this, but it may make the tax so heavy as to discourage multiplication of units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. (citing cases) * * * A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade."

Not only may a state tax in such manner as to encourage one form of business and restrict the development of another, but it may tax so heavily as to destroy a business without violating the equal protection clause of the Fourteenth Amendment.

In Alaska Fish Co. v. Smith, 255 U. S. 44, 48, a statute of Alaska, levying a heavy license tax upon persons manufacturing fish oil, was held valid against the contention that it would confiscate plaintiff's business. The Court said:

"If Alaska deems it for its welfare to discourage the production of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of plaintiff's industry than upon similar use of other fish * * *, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years. * * * Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."

The oleomargarine tax considered in Magnano v. Hamilton, 292 U. S. 40, was presumably destructive of the business, the tax being fifteen cents per pound; but it was held valid, this Court saying (p. 45):

> "The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the ten per cent. tax imposed upon the notes of state banks involved in Veazie Bank v. Fenno, 8 Wall. 533, 548. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments."

From what has been said it is clear that this Court recognizes that a state may properly exercise its police power in connection with its taxing power in levying a chain store tax.

POINT 2.

The Minnesota chain store tax was laid for the dual purpose of raising revenue and to promote the general welfare by restricting the undue expansion of chain stores.

In considering the question whether the legislature, in levying this tax, was seeking to restrain the undue expansion of chain stores, we contend that this Court should take judicial notice of several facts of common knowledge. The first of these is that for a period of several decades chain stores have made a rapid encroachment upon the field of merchandising formerly occupied by independent stores. Willard L. Thorp, editor of Dun's Review, in an

address before the American Economic Association on December 29, 1938, said:

> "It is easy to summarize the growth of chains up to 1929. The chain store population grew at an amazingly steady rate. Except for the war years, when the rate was appreciably accelerated, the annual increase in the number of chain outlets proceeded neatly along a compound interest course, doubling in number about every six and one-half years. Wearing apparel chains increased more rapidly in number, while grocery chains increased somewhat less rapidly. However, this last fact was more than offset by the extraordinary expansion of Great Atlantic and Pacific Tea Co., which increased from 10.8 per cent of all chain outlets in 1914 to 30.9 per cent at the end of 1925."

Mr. Thorp further made it clear that while the number of chain store outlets did not increase from 1929 to 1937 there was a notable growth in total sales.

During the period from 1929 to 1937, when independent grocers made little advance in sales, nine of the major grocery chains increased their annual sales from 898 million dollars to 1011 million dollars, an increase of 13 per cent. The three leading shoe chains had sales in 1929 of about 55 million dollars, in 1937 of 67 million dollars. Two drug chains advanced from 62 million to 90 million dollars.[1]

Furthermore, the State District Court's findings show a notable growth in the relative sales of chain stores, both state and national, during the years immediately preceding the passing of the Act under review. We quote

[1]Willard Thorp, Editor Dun's Review, From an address entitled, "Changing Distribution Trends," before American Economic Association, Dec. 29, 1938. Printed in American Economic Review, Vol. 29, pp. 75-84, March, 1939. Reprinted in "Chain Stores and Legislation," compiled by Daniel Bloomfield.

from the State District Court's findings of fact (R. 44, 78):

> "The figures for eighteen of the most important lines of retail business in the State show that in 1929 13.5 per cent of the total volume was done by chain stores and 79.3 per cent by single stores, and in 1933 17.8 per cent was done by chain stores and 76.8 per cent by single stores. * * * For the entire United States the figures were: 1929, chains 20 per cent, single stores 77.5 per cent; 1933, chains 25.2 per cent, single stores 71.2 per cent."

The second fact of which this Court should take judicial notice is that chain stores enjoy advantages in merchandising over single stores increasing with increases in total sales. This is supported by the State District Court's findings (R. 45-46, 78-80), in which the court sets forth sixteen such advantages. These were as follows:

> "At the time of and at all times subsequent to the adoption of the act the system of selling goods by the system of chain stores as carried on in Minnesota differed from the system of selling goods in independently owned stores not associated in voluntary chains, in many ways, and had the following advantages over the latter system:
>
> (1) The chain store groups buy goods in larger quantities and thereby secure larger quantity discounts than independent stores.
>
> (2) The chain store groups have greater financial power and thereby are enabled to take advantage of cash discounts in many cases not available to independent stores.
>
> (3) The chain store groups receive substantial special rebates and advertising allowances generally not granted to independent stores.

(4) The chain store groups make use of central warehousing and thereby effect economies in warehousing not available to independent stores.

(5) The chain store groups deliver a considerable portion of their goods from their warehouses to their several stores in full truck lots and thereby effect economies in delivery expense not available to independent stores.

(6) The chain store groups have more abundant capital and therefore have better credit and pay lower interest rates than independent stores.

(7) The chain store groups maintain research divisions which give them advance information about many things useful in buying and selling goods, such as, impending price changes and location of favorable buying markets. They also have greater skill in buying so as to keep the stores stocked with goods suitable in price, style and quality to the purchasing demand.

(8) The chain store groups have a more rapid turnover than independent stores.

(9) The chain store groups, particularly in the larger cities, enjoy advertising advantages over independent stores in being able to advertise sales at several stores in the same advertisement, thereby cutting down the cost of advertising.

(10) The chain store groups use a more or less standardized method of displaying goods which has advantages in advertising and in making sales over the methods employed by independent stores.

(11) The chain store groups equip their stores with standardized equipment and in this manner effect economies in the cost of equipment and in the usefulness of equipment in case a store is discontinued.

(12) The chain store groups maintain stores only in cities and villages that have been proved to be good

centers for the sale of their goods. They do no pioneering as do independent stores.

(13) Each store in a chain store group profits from the good will built up by other stores in the same system.

(14) In the past prior to the passing of the unfair trade practices act in Minnesota in 1937 chain stores have injured competitors and extended their own business by the use of loss leaders.

(15) Chain store groups manufacture and otherwise produce the goods they sell to a far greater extent than do independent stores and thereby effect economies in the cost of these goods.

(16) Chain store groups open stores only in the better locations in each city and thereby enjoy location advantages in selling goods.

Chain store groups enjoy most of the foregoing chain-store advantages over stores which are members of voluntary chains.

Plaintiff enjoyed most of the foregoing chain store advantages over independent stores."

In view of these findings it is clear that chains possess the power to wage an unequal battle in their competition with single stores.

The third fact of which this Court should take judicial notice is that during the past fifteen years there has been a nation-wide movement to restrain the undue expansion of chain stores, resulting in legislation in many states taxing chain stores, and in the passing of an act by Congress designed to restrain unfair trade practices of chain stores, which bears the popular name, Chain Store Act, or Robinson Patman Price Discrimination Act. U. S. C. A. Index, 1939 Cum. An. Pocket Part, p. 4. This Court should further take judicial notice of the fact that this movement

to restrict the excessive growth of chains was particularly active in Minnesota.

Many excellent authorities in the field of merchandising agree that chain store taxes throughout the United States have been laid for the dual purpose of raising revenue and to assist the smaller merchandising units by curbing the undue expansion of chain stores.

On December 2, 1937, Charles F. Phillips, Assistant Professor of Marketing at Colgate University, writes in "Printers Ink":

> "It must be evident to all observers of the retail field that there is in existence a widespread movement having as its aim the providing of security for the 'little fellow.'
>
> "One manifestation of this movement is found in the discriminatory chain-store tax laws now found in seventeen states * * *. While such laws have been passed under a number of pleas, it is obvious that the support which has been given to them by many retail associations has stemmed from the idea that an additional tax placed on the chains would make it just that much easier for the little fellow to compete."[1]

In Bulletin No. 1, Twentieth Century Fund, the conclusion is reached that chain store taxes are levied primarily for police power purposes. We read:

> "Are these taxes levied for the sake of additional revenue? The revenue which they yield, compared with that from other sources, has been of minor importance. To a considerable extent, therefore, the

[1]Article by Charles F. Phillips, in Printers Ink, Dec. 2, 1937, reprinted in "Chain Stores and Legislation," compiled by Daniel Bloomfield. See p. 143 in Bloomfield's book.

objective has been, frankly, not revenue, but business control." [1]

To the same effect is the article by Alfred Buehler, in Journal of Marketing, 1937, where Mr. Buehler says:

"The purpose of chain store taxes is social rather than fiscal." [2]

The fourth fact of which this Court should take judicial notice is that chain stores in many cases have used their power unfairly and oppressively and have conducted their business in such a manner as to cause injury to large numbers of the inhabitants of the state. These unfair practices and these injuries are set forth in finding 11 of the State District Court's first findings, which is as follows:

"The development of chain store groups in Minnesota has had many effects injurious to the general welfare, among the most important of which are the following:

(1) By reason of the advantages of chain stores over independent stores, chain stores throughout Minnesota have gradually been driving independent stores out of business and gradually been taking over a larger and larger portion of the total field of retail sales made within the state.

(2) The development of chain store groups in Minnesota has driven out of business a considerable number of jobbers and wholesale houses within the state and thereby added considerably to unemployment and considerably lessened the value of the taxable property within the state.

(3) It has greatly reduced the number of traveling salesmen and thereby added to unemployment.

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[1] Reprinted in Chain Stores and Legislation, compiled by Daniel Bloomfield. See Bloomfield's Book, p. 100.

[2] The Incidence of Chain Store Taxes, Journal of Marketing for January, 1937. Reprinted in Chain Stores and Legislation, compiled by Daniel Bloomfield, see p. 45 in Bloomfield.

(4) It has caused farmers throughout the state to find a less ready market for their fruit and vegetable products.

(5) Money has been withdrawn from banks in the villages and smaller cities where chain stores have operated and has been concentrated in the larger cities, thereby weakening the banking structure in rural communities.

A chain store group with a comparatively small number of stores is less injurious to the general welfare in the respects set forth in this paragraph than a chain store group with a large number of stores. The tendency is for the injury to the general welfare to increase with an increase in the number of stores in a chain." (R. 508, 530-531)

While these findings were omitted in the State District Court's ultimate findings, uncontradicted evidence lends support to most of them, as is fully shown in the statement of facts. Moreover, the final findings include a finding that "In the past prior to the passing of the unfair trade practices act in Minnesota in 1937 chain stores have injured competitors and extended their own business by the use of loss leaders." (R. 46, 80)

When the Minnesota legislature of 1933 met to consider chain store legislation it was confronted with the facts to which we have just called attention, namely, that the chain stores of the state were rapidly taking over the field formerly occupied by single stores, that these chains enjoyed many substantial merchandising advantages over single stores, had driven many single stores out of business, injured jobbers and wholesale houses and thereby added to unemployment, lessened the value of taxable property in Minnesota, reduced the number of traveling salesmen

and thereby added further to unemployment, and finally, that chain stores have been guilty of unfair methods of competition in driving out their weaker competitors.

With these facts before them the legislature passed the Chain Store Tax Act of 1933.

In the light of the foregoing facts it is inconceivable that the Act could have been passed otherwise than for the dual purpose of raising revenue and to curb the undue expansion of chain stores, and particularly large chains. The chains, and especially the large chains, had the chain store advantages in merchandising which gave them the power to injure weaker competitors. They were expanding rapidly. They used unfair methods of competition. They were causing injury to considerable portions of the people of the state. Moreover, the Act speaks for itself. It is apparent that when a legislature singles out chain stores for the levying of a tax from which individual stores are free it does so for a purpose additional to that of raising revenue. More revenue could have been produced by making the tax applicable to all stores. There could have been no other purpose in singling out chains for taxation and exempting single stores than a motive to curb chains and favor the growth of single stores. Furthermore, when the legislature made the tax progressively higher, and not merely relatively higher, with increases in the size of the chains, it announced more effectively than it could have done by direct statement, a purpose to restrict especially the growth of the larger chains.

Burden of Proof on Plaintiffs.

The burden rests upon plaintiffs to show that there were no police power purposes in the passing of the Act. As was said by this Court in the case of Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 209:

> "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

It is not difficult to conceive of a state of facts that will sustain the progressive features of the Minnesota chain store tax. They are written so large as to be the common knowledge of every man.

When plaintiffs in their complaint tendered the issue as to whether the Act was passed for police power purposes, they assumed the burden of proving that fact. This burden has not been sustained. Plaintiff presented no evidence showing that the legisfature was not actuated by police power purposes in passing the Act.

Moreover, while respondents deny that the act was passed for a police power purpose they specifically allege that it has a police power effect, by alleging as follows in paragraph IV of their complaints.

> "While the Act purports to impose an occupation or privilege tax, the amount thereof as to plaintiff and many subject thereto is so oppressively excessive as to consume all profits which it is possible to derive from

> the operation of their business in the State, and the Act would therefore render the continued operation of such businesses impossible and would destroy the very occupation and privilege for the enjoyment of which the tax is enacted * * *." (R. 5, 60)

It seems to us that respondents cannot consistently contend both that the Act was not passed to curb the undue expansion of chain stores and also assert that it has that effect. An act must be judged as to its purposes by its effects.

POINT 3.

The classification of chain stores for taxation on the basis of gross sales as provided in the Act is reasonable and valid under the equal protection clause and the due process clause of the Fourteenth Amendment.

Classification for the purpose of taxation is permissible.

If there is any reasonable difference between the classes created they may be taxed on a different basis without violating the equal protection clause of the Federal Constitution. In Brown Foreman Co. v. Kentucky, 217 U. S. 563, 573, this Court says:

> "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subject to special forms of regulation or taxation through an excise or license tax. If the taxation is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

Capacity to pay taxes increases with the size of the business measured in terms of total sales.

For a long term of years the Harvard University Bureau of Business Research, under the direction of Carl N. Schmalz, assistant professor of marketing in Harvard University, and assistant director of this bureau of research, has made a thorough nation-wide study of the operating experience of department stores.

Bulletin No. 74 of the Harvard University Bureau of Business Research, which is a study of "Operating Expenses of Department Stores and Departmentized Specialty Stores in 1927," is based on reports from 575 department stores and departmentized specialty stores located in forty-seven states and territories of the United States, the District of Columbia and the Dominion of Canada, only ten of the stores, however, being in Canada. The aggregate sales of these stores was $1,214,053,287 in 1927.

The conclusions reached by this study with reference to net gain of stores with sales of less than $1,000,000 and net gain of stores with sales of more than $1,000,000 are as follows, quoting from page 2 of said bulletin:

	Department Stores		Specialty Stores	
	Net sales less than $1,000,000	Net sales over $1,000,000	Net sales less than $1,000,000	Net sales over $1,000,000
Net gain[1] in percentage of net sales	3.3%	4.4%	2.1%	6.1%
Net gain in percentage of net worth	7.2%	10.5%	7.0%	16.0%

We find that the stores with the larger sales have a marked advantage in net gain over the stores with the smaller sales.

The Harvard University Bureau of Business Research has made a study of operating results of department and specialty stores in 1929. This study was based on reports from 698 stores with aggregate sales in 1929 of approximately $1,500,000,000. (Bulletin No. 83, Harvard University Bureau of Business research, pp. 1 and 3)

Table 2 on page 3 of this study shows a progression in net gain for department and specialty stores with increases in volume of sales, whether figured in percentage of net sales or in percentage of net worth, as follows:

---

[1]Net gain, as used in these studies, includes all net returns including interest on invested capital. Net profit, on the other hand, includes only the net returns remaining after deducting interest at 6% on invested capital.

	Department Stores'			Specialty Stores'		
	Net sales less than $500,000	Net sales $500,000 to $1,999,000	Net sales $2,000,000 or more	Net sales less than $500,000	Net sales $500,000 to $1,999,000	Net sales $2,000,000 or more
Number of reports	226	168	133	35	29	21
Aggregate sales in thousands	$59,137	$169,606	$1,190,523	$10,031	$27,804	$121,790
Gross margin	29.3%	31.8%	33.6%	32.2%	34.4%	35.8%
Net gain in percentage of net sales	2.3%	3.1%	4.2%	2.8%	3 %	5.2%
Net gain in percentage of net worth	5.7%	7.5%	8.5%	6.5%	11.5%	14 %

With refernce to their merchandising advantage it is significant that the larger stores get a considerably larger gross margin than do the smaller stores.

While this study was nation-wide in scope it is probable that it is fairly representative of operating results in Minnesota.

The larger stores having this notable advantage in merchandising the legislature may properly take note of this fact and levy a heavier gross sales tax on the stores with the larger sales.

This bureau of research has made a comparative study of the operating results of department stores with sales of $500,000 to $2,000,000 and with sales of over $2,000,000. This study covers the years 1927 to 1930 inclusive, is nation-wide in scope and is based on reports from several hundred stores. This study shows a significant trend toward higher percentages of net profit in the stores having larger sales, as is shown by the following excerpt from Table 2 on page 6 of Bulletin No. 85:

ITEMS	Department Stores with Net Sales of from $500,000 to $2,000,000				Department Store with Net Sales of $2,000,000 or more			
	1927	1928	1929	1930	1927	1928	1929	1930
Number of reports	172	116	168	168	98	107	133	151
Gross margin	31.6	31.7	31.8	31.6	33.6	33.8	33.6	33.6
Total expense	31.0	31.4	31.7	33.4	31.4	32.1	32.5	34.1
Net profit or loss	0.6%	0.3%	0.1%	1.8% LOSS	2.2%	1.7%	1.1%	0.5% LOSS
Net other income including interest on capital	2.9%	3.0%	3.0%	2.8%	2.7%	3.2%	3.1%	3.2%
Net gain in percentage of net sales	3.5%	3.3%	3.1%	.0%	4.9%	4.9%	4.2%	2.7%
Net gain in percentage of net worth	8.2	8.7	7.5	.4	11.3	10.1	8.5	4.9

It is apparent that the stores with the larger gross sales make a far greater percentage of net profit: in 1927, 2.2% for the larger and .6% for the smaller, nearly four times as great; in 1928, 1.7% for the larger, .3% for the smaller, nearly six times as great; in 1929, 1.1% for the larger, and .1% for the smaller, eleven times as great; and in 1930 suffering a net loss of only .5% as compared with a net loss of 1.8% for the smaller stores.

The more significant figures, however, are those showing total net gain, including interest on invested capital. In this comparison also there is a striking advantage in favor of the stores with larger gross sales, the comparative advantage in percentage of net gain being as follows:

		Net gain
Year 1927	Stores with $2,000,000 sales or more	4.9%
	Stores with less than $2,000,000 sales	3.5%
Year 1928	Stores with $2,000,000 sales or more	4.9%
	Stores with less than $2,000,000	3.3%
Year 1929	Stores with $2,000,000 sales or more	4.2%
	Stores with less than $2,000,000 sales	3.1%
Year 1930	Stores with $2,000,000 sales or more	2.7%
	Stores with less than $2,000,000 sales	1.0%

Another study of the Harvard University Bureau of Business Research breaks up department stores into nine groups on the basis of amount of total sales and compares operating results. We quote from this study the items comparing net gain in percentage of net sales and net gain in percentage of net worth.

Items	Sales less than $150,000	Sales $150,000 to 300,000	Sales 300,000 to 500,000	Sales 500,000 to 750,000	Sales 750,000 to 1,000,000	Sales 1,000,000 to 2,000,000	Sales 2,000,000 to 4,000,000	Sales 4,000,000 to 10,000,000	Sales over 10,000,000
Number of reports	76	88	81	58	35	75	67	54	30
Net gain in percentage of net sales	2.0%	.2%	.5%	1.3%	0.1%	1.2%	2.7%	2.5%	3.3%
Net gain in percentage of net loss worth	3.3% loss	.1%	1.5%	2.3%	0.6%	3.2%	4.5%	4.6%	6.4%

The advantage of large scale merchandising is shown by the fact that there is a progression in net gain in percentage of total sales from a 2% loss in the group having less than $150,000 in annual sales to a 3.3% gain in the group having sales over $10,000,000. There is also a substantially steady advance in percentage of net gain from the smaller to the larger sales groups.

Bulletin No. 78 of this bureau is a study of chain store operating results of 162 department stores with net sales of over $1,000,000 each. The study was made for the year 1928 and is based on the reports of department stores in forty-seven of the forty-eight states, eleven being Minnesota stores. Table 8 of this bulletin (p. (11)) shows progressive increases in the rate of net profit of these stores in relation to volume of sales, as follows:

55 stores in one to two million dollar class... .9%
42 stores in two to four million dollar class...1.1%
40 stores in four to ten million dollar class...1.6%
25 stores in over ten million dollar class...2.8%

The progressive increase, with increase in sales volume, in net gain in percentage of net sales is equally striking, namely:

55 stores in one to two million dollar class...3.8%
42 stores in two to four million dollar class...4.5%
40 stores in four to ten million dollar class...4.8%
25 stores in over ten million dollar class...5.8%

A similar showing results when stating the comparison in percentage of net worth, namely:

55 stores in one to two million dollar class...9.7%
42 stores in two to four million dollar class...9.2%
40 stores in four to ten million dollar class...9.8%
25 stores in over ten million dollar class..12.1%

Commenting on the results of another study of department store merchandising in Bulletin 78 of the Harvard Bureau of Business Research, the editor says (page 43):

> "Despite higher total expense, the large stores typically had a much better net profit than did the small stores, because of much higher gross margin."

And on page 47 we find this conclusion reached:

> "As between department and specialty stores, those with sales over $1,000,000 consistently showed higher net profit, higher net gain, and faster stock turn, than did those with sales of less than $1,000,000."

In view of the fact that it is possible to quote statistics from the depression years which do not fully agree with the findings for normal years the study made in Bulletin 100 of the Harvard Bureau of Business Research is significant. In this study of "Operating Results of Department and Specialty Stores for 1935," Professor Schmalz found that the large department stores of the United States again showed the higher percentage earnings which they generally had reported prior to 1933 (p. 1). Commenting on the results shown by his study Professor Schmalz says (p. 11):

> "In view of these circumstances the most significant fact disclosed by Table 10 is the fact that the 1935 earnings for department stores with sales of less than $500,000 were noticeably poorer than those for me-

dium-size and large stores. Thus in 1935 there was a return to the relationships prevailing before 1933 when the rate of profit tended to be highest for the largest stores and smallest for the smallest stores. Apparently the relatively good showings of the small stores in 1933 and 1934 were due, as also was suggested in Bulletin 96, to some temporary tendency for the forces of recovery to benefit the smaller stores more, or earlier, than the large ones."

It is significant that this study finds, not merely that the larger department stores have larger net earnings than the smaller ones, but that the rate of profit tended to be highest for the largest stores and smallest for the smallest stores.

The following quotation from Bulletin 85, page 8, is to the same effect:

"It is quite clear that the larger stores operated on a distinctly more satisfactory basis than the smaller stores, and that success as measured by earnings varied directly with size."

The Harvard University Bureau of Business Research has also made a study of the operating experience of food chains in 1934. This study was based on the experience of 21,000 stores operated by 66 chains which made sales in 1934 of about $960,000,000. With reference to the rate of profit of food chains with large sales and food chains with small sales, Carl N. Schmalz, Assistant Professor of Marketing and the director of this study, makes the following comment:

"From these tables it is clear that the high-profit * * * firms among the reporting food chains, as contrasted with other chains having lower net profit rates,

showed some tendency to be larger as regards total sales * * *."[1]

It is apparent that if the rate of net profit of the chains with the larger sales is higher the total net profit of such chains must be a great deal higher.

The foregoing studies are the more significant because one of respondents is operating a department store chain and the other is operating a food chain.

This Court may take judicial notice of the foregoing facts, for they are matters of common knowledge.

Slight differences sufficient to sustain classification.

In Rast v. Van Dieman, 240 U. S. 342, this Court upheld a Florida act imposing on each person giving away redeemable trading stamps in connection with the sale of merchandise a state license tax of $500 and a $250 county tax in each county in which the business was conducted. This Court said:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived to sustain it."

Similarly this Court has sustained differences in taxation based upon location of a warehouse, whether on or off the right-of-way of a railroad, Cargill Co. v. Minnesota, 180 U. S. 452; differences based on the number of women employed by a laundry, Quong Wing v. Kirkendall, 223 U. S. 59; differences based on the character of the loans made by bankers, Bradley v. Richmond, 227 U. S. 477; and dif-

[1] Bulletin No. 99, Harvard University Bureau of Business Research, pp. 1 and 9.

ferences based on the price of admission charged by theatres, Metropolis Theatre Co. v. Chicago, 228 U. S. 61. It is apparent that each of these classifications was based upon comparatively slight differences between class and class.

The Supreme Court of Minnesota likewise has upheld classification based on slight differences as a proper basis for a difference in the amount of tax, holding valid the preferred classification of unplatted real estate over platted real estate, State ex rel. Chase v. Minnesota Tax Commission, 135 Minn. 205, 160 N. W. 498; recognizing a difference between trucks operating on regular time and route schedules and trucks not following such schedules, Raymond v. Holm, 165 Minn. 215, 206 N. W. 166; upholding preferred classification of real estate for taxation on the basis of use for a homestead and subclassification on the basis of value, the preferred treatment stopping at $4000, Apartment Operators Association v. City of Minneapolis, 191 Minn. 365, 254 N. W. 443; and sustaining exemptions in an income tax depending on marital status and number of dependent children, and upholding subclassification and graduation of the taxes based on amount of income, Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102.

Cases in the Supreme Court of the United States holding graduated chain store taxes valid.

During the past nine years this Court has upheld the tax acts of five states classifying chain stores as a separate group for tax purposes and in four of the five states, subclassifying them for the imposition of progressively heavier taxes on the larger chains. The acts of these four states made the number of stores in the chain the measuring rod in determining the size of the chain.

In upholding the chain store tax acts of Indiana, State Board of Tax Commissioners v. Jackson, 283 U. S. 527; of North Carolina, Great Atlantic and Pacific Tea Company v. Maxwell, 284 U. S. 575; of Florida, Liggett Co. v. Lee, 288 U. S. 517; of West Virginia, Fox v. Standard Oil Co., 294 U. S. 87; and of Louisiana, Great Atlantic and Pacific Tea Company v. Grosjean, 301 U. S. 412, this Court laid emphasis upon the following propositions:

1. Classification of businesses for purposes of taxation is permissible even if the difference between the subjects taxed is not great. The legislature must be given wide discretion in classification. In Liggett Co. v. Lee, supra, the Court said (p. 533):

> "that the difference between the subjects taxed need not be great; and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law."

See also Tax Commissioners v. Jackson, supra, p. 537.

2. The difference between the chain-store method of merchandising and the single-store method and the advantages of the former are sufficient to justify separate classification and a tax on the chain store not imposed upon the single store or a higher tax on the former than on the latter. Tax Commissioners v. Jackson, supra, 541.

3. Increased chain store advantages resulting from adding units to the chain justify subclassification and the imposition of a tax progressively higher per unit as the number of units increases.

In Fox v. Standard Oil Co., supra, this Court said (p. 100):

> "A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis . . . ."

4. A chain store tax may be used for the police power purpose of restricting the inordinate growth of chain stores and thereby promoting the development of other forms of merchandising.

In Fox v. Standard Oil Co., supra, this Court, speaking through Mr. Justice Cardozo, said (p. 100):

"Not only may it do this (tax the large chains more heavily than the small ones), but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry."

In Pacific Fisheries v. Alaska, 269 U. S. 269, a statute passed by the legislature of Alaska, levying a graduated tax on the canning of salmon by fish canneries, was under attack on the ground that it violated the due process clause of the Fifth Amendment. This act levied a flat tax of ten cents per case on all salmon and an additional tax on certain kinds of salmon as follows:

10,000 to 25,000 cases, five cents per case;
25,000 to 40,000 cases, ten cents per case;
40,000 to 50,000 cases, fifteen cents per case;
over 50,000 cases, twenty cents per case.

This tax is progressive, on the basis of quantity, exactly as the gross sales portion of the Minnesota tax is progressive, on the basis of quantity. Each tax places a progressively heavier burden on the larger business. There can be no possible difference in principle between them by reason of the fact that one is a tax on the canning of a commodity, canned for sale, and the other a tax on the sale of commodities.

It is of course, elementary, that the restrictive effect of the due process clause of the Fifth Amendment as applied to the federal government and the territories is the same as the restrictive effect of the same clause of the Fourteenth Amendment as applied to the states.

Answering the contention in this case that the progressive character of the tax discriminated against the larger canneries Mr. Justice Holmes said (p. 278):

> "It is much pressed that the tax discriminates against large canneries in favor of small ones—this especially contravening the due process clause of the Fifth Amendment and denying due process of law. Classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore. By way of specific answer it is pointed out by the Attorney General of Alaska that the size of the run of salmon cannot be foreseen; that a cannery must be prepared to its fullest capacity; that there will always be an irreducible minimum of expense to be borne whatever the size of the pack; that therefore a small pack may mean a loss and a larger one a profit, and that on these considerations the law may justly attempt to proportion the tax to the probable gains. The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights."

Similar considerations should sustain the validity of the Minnesota progressive chain store tax.

The chain store taxes sustained by the Supreme Court of the United States the same in principle as the Minnesota tax. Operation of Minnesota tax more nearly equitable than taxes based only on number of stores.

In four of the five chain store tax cases referred to above (all but the North Carolina case) the tax under consideration was graduated in such a way as to become progressively higher per unit as the number of units increased.

The taxes passed upon in these four cases differed from the Minnesota tax in form in that they were levied on the basis of the number of stores in the chain, whereas the Minnesota tax is composite, consisting of one portion levied on the basis of the number of stores in the chain and of one portion levied on the basis of the total sales made by the chain. The Minnesota tax is like the taxes passed upon in these four cases in that it becomes progressively heavier as the size of the chain increases.

We contend that there is no difference in principle between a progressive chain store tax based on the number of stores as the measuring rod of chain store advantage and chain store power to cause social and economic injury and a chain store tax based on two measuring rods, number of stores and total sales. This contention must be valid unless there are arbitrary qualities in the second measuring rod, total sales, not found in the first. We believe we can show from the evidence in these cases, not merely that the second measuring rod is as fair as the first, but that the combined effect of the two measures results in a tax more nearly equitable than the tax based only on number of stores.

We can make no more pertinent comparison of the two kinds of taxes than by noting the results of applying them to the two respondents in these cases. We give below the amount of gross sales, the number of stores, the amount of the specific tax, the amount of the gross sales tax, and the amount of the composite tax of the two respondents for the year 1934.

	Gross Sales	No. of Stores	Specific Tax	Gross Sales Tax	Composite Tax
Allied Stores	$9,714,374	2	5	$40,902	$40,907
National Tea.	$5,288,845	154	$18,520	$45,222	$63,742

These figures speak for themselves. The amount of the specific tax on Allied Stores Corporation is to the amount of the specific tax on National Tea Company as 1 to 3704, the amount of the composite tax, approximately, as 41 to 64. National Tea Company, with annual gross sales in Minnesota of a little over $5,000,000, cannot enjoy chain store advantages or chain store power to cause social and economic injuries 3704 times as great as Allied Stores Corporation, with annual sales of nearly $10,000,000. But, in view of the fact that National Tea Company has so many outlets, and Allied Stores Corporation only two, the proportion of 64 to 41 is presumably not far from accurate.

An examination of the tax levy on more than 300 chains which do business in Minnesota, as shown by plaintiffs' Exhibit A (R. 589-596), will show that generally the composite tax, which the State District Court and the State Supreme Court condemn, operates more nearly equitably than the specific tax, which these courts uphold.

We compare next the tax on W. T. Grant Co., a limited department chain with total sales in 1934 of $1,347,107, and L. P. Jesperson, a general merchandise chain with total sales in 1934 of $29,317.

	Total Sales in 1934	No. of Stores	Specific Tax	Gross Sales Tax	Composite Tax
W. T. Grant Co.	$1,347,107	3	$10	$1,257.12	$1,267.12
L. P. Jesperon	29,317	3	10	10.01	22.01

The sales of Jesperson are only a little more than two per cent of the sales of W. T. Grant Co. Yet the specific tax is $10 for each chain. Obviously, the composite tax of $1267.12 for the Grant Co. and $22.01 for Jesperson comes closer to representing their relative chain store advantages and their relative power to injure weaker competitors than the specific tax of $10 on each.

The greater fairness of the composite tax is equally apparent in the following comparison of the 1934 tax on S. S. Kresge Co. and Fanny Farmer Candy Stores.

	Total Sales in 1934	No. of Stores	Specific Tax	Gross Sales Tax	Composite Tax
S. S. Kresge Co.	2,832,409	14	105	13,409.54	13,514.54
Fany Farmer Candy Shops	341,568	15	120	279.60	399.60

S. S. Kresge Co., with eight times as large total sales from its fourteen stores as Fanny Farmer Candy Shops had from its fifteen stores, paid $105 specific tax as compared with Fanny Farmer's $120. The composite tax, which was $13,514.54 for Kresge and $399.60 for Fanny Farmer is obviously a fairer apportionment of taxes.

The relatively greater fairness of the composite tax as compared with the specific tax when applied on the one

hand to chains with comparatively few stores but large sales and on the other to chains with few stores and small sales is convincingly brought out by comparing all Minnesota chains in the first class with sales of more than $1,000,000 and all chains in the second class with sales of under $25,000.

We present first a summary of the taxes paid in 1934 by chains large in total sales but small in number of stores:

Name of Chain	No. of Stores	Total Sales in 1934	Specific Tax	Gross Sales Tax	Composite Tax
Allied Stores Corporation	2	$ 9,714,374	$ 5	$ 40,902.38	$ 40,907.38
Grand Union Tea Co.	3	1,347,107	10	1,257.12	1,267.12
S. S. Kresge Co.	14	2,832,409	105	13,409.54	13,514.54
Montgomery Ward & Co.	16	6,777,204	135	29,138.12	29,273.12
Quality Food Stores, Inc.	15	1,334,402	120	4,735.70	4,855.70
Rothschild	4	2,997,814	15	6,947.99	6,962.99
M. W. Savage Co.	9	1,039,721	40	160.64	200.64
C. Thomas Stores	23	1,887,232	300	10,860.67	11,060.67
Walgreens Co.	17	2,261,573	150	13,798.98	13,948.98
Witts Market House	4	2,506,292	15	659.33	674.33
	107	$31,698,128	$895	$121,870.47	$122,665.47

The total sales of Montgomery Ward & Co. reached the vast total of $6,777,204, but as there were only sixteen stores the specific tax was only $135, an amount utterly inconsequential in equalizing the advantages of this powerful chain against its small competitors. S. S. Kresge Co. made sales of $2,832,409. Its specific tax was $105 and its composite tax $13,514.54. It would have been impossible to levy a specific tax on any of these corporations approximating the amount of the composite tax without at the same time destroying the chains with relatively small sales per store.

The total sales in 1934 of these ten chains was $31,698,132. The average sale per store was $296,244. The stores being few the total specific tax paid by these ten chains was only $895. The total sales being large, the total gross sales tax was $122,665.47. The average specific tax amounted to $8.36 per store. The average composite tax amounted to about $1155 per store. On the average these chains paid a specific tax of $1.00 for each $35,419 in sales. On the other hand, they paid a composite tax of $1.00 for each $258 in sales, or about ¼ per cent. It is apparent that the specific tax on these stores could have substantially no effect in accomplishing the purposes of the act, whereas the effect of the composite tax would be substantial.

At the other end of the size range we find eighteen Minnesota chains having sales in 1934 below $25,000. These were the following:

Name of Chain	No. of Stores	Total Sales in 1934	Specific Tax	Gross Sales Tax	Composite Tax
C. J. and H. M. Anderson	2	$ 18,088	$ 5	$ 2.86	$ 7.86
Eastern Minn. Power Co.	5	12,609	20	4.46	24.46
A. & J. Engel, Inc.	2	10,383	5	2.14	7.14
Fuller Brush Co.	2	4,394	5	.65	5.65
Gray Shoppe	2	21,973	5	4.53	9.53
Hoover Co.	3	22,214	10	3.78	13.78
Independent Gro. & Meat Co.	2	5,087	5	.51	5.51
Alfred J. Krank	2	22,353	5	5.81	10.81
Marigold Dairies	5	7,609	20	1.71	21.71
Minnesota Utilities Co.	2	24,623	0	8.54	8.54
North American Creamery Co.	2	17,189	5	3.72	8.72
Root River Power & Light Co.	2	6,125	5	.74	5.74
Sigmond & Sons, Inc.	2	20,425	5	2,61	7.61
Smith-Burd Co.	2	19,967	5	2.99	7.99
Spalding Bros.	2	24,141	5	2.62	7.62
C. Thomas Markets	3	17,192	10	1.00	11.00
Toledo Scales Co.	2	24,113	5	2.64	7.64
United Mercantile Stores	2	23,472	5	4.62	9.62
Total	44	$301,957	$125	$55.93	$180.93

The total sales during 1934 of the forty-four stores of these eighteen chains was $301,957. The average sale per store was $6,862. The total amount of specific taxes paid by these eighteen chains was $125. The total amount of composite taxes paid was $180.93. The average specific tax amounted to $2.84 per store. The average composite tax amounted to $4.11. On an average these chains paid a specific tax of $1.00 for each $2,416 in sales and a composite tax of $1.00 for each $1,669 in sales.

Comparing the results of applying the specific tax and the composite tax to these two groups of chains we find that the specific tax results in a tax of $2.84 per store on the small chains and $8.36 per store on the large chains, whereas the composite tax results in a tax of $3.89 per store on the small chains and $1,155 per store on the large chains. Looked at from the point of view of comparative sales we find the specific tax results in an average tax of $1.00 for each $2,416 in sales of the small chains and a tax of $1.00 for each $35,419 in sales on the large chains. The incidence of the specific tax measured in total sales is nearly fifteeen times as heavy on the small chains as on the large. The composite tax on the small chains results in an average tax of $1.00 for each $1,669 in sales and in an average tax on the large chains of $1.00 for each $258 in sales. On the basis of total sales the incidence of the composite tax is more than six times as heavy on the large chains as on the small ones.

The equitable character of the composite tax on chain stores can best be shown by classifying the 272 chains that made complete reports in 1934 in the eleven classes set up by Section 2(b) of the Act, namely, chains with

total sales of less than $100,000, chains with total sales of $100,000 to $200,000, and so on up to chains with sales of over $1,000,000; and noting the incidence of the specific tax as compared with the incidence of the composite tax. The following table has been compiled from Plaintiffs' Exhibit A and includes all the chains reporting in 1934 that made complete reports.

SUMMARY OF TAXES PAID BY MINNESOTA CHAINS REPORTING IN 1934.

Year—1934	No. of Chains	No. of Stores Taxable	Total Sales	Taxable Sales	Total Specific Tax	Total Sales Tax	Total Composite Tax	Percentage of Specific Tax to Total Sales	Percentage of Composite Tax to Total Sales
Chains with gross sales of less than $100,000	108	168	$ 5,742,006	$ 2,383,202	$ 880	$ 1,209.01	$ 2,089.01	.000153	.000363
Chains with gross sales of $100,000 to $200,000	74	221	10,617,949	5,243,997	1,275	2,806.98	4,081.98	.0001201	.000384
Chains with gross sales of $200,000 to $300,000	26	80	6,261,459	2,981,241	470	1,852.08	2,322.08	.000075	.0003708
Chains with gross sales of $300,000 to $400,000	18	75	6,243,842	3,098,578	555	2,600.75	3,155.75	.0000888	.000505
Chains with gross sales of $400,000 to $500,000	12	101	5,432,099	3,344,464	1,245	3,567.02	4,812.02	.000229	.0008853
Chains with gross sales of $500,000 to $600,000	4	32	2,147,062	1,555,708	210	1,936.74	2,146.74	.0000978	.0009998
Chains with gross sales of $600,000 to $700,000	3	17	1,937,864	1,108,516	85	1,735.45	1,820.45	.0000438	.0009395
Chains with gross sales of $700,000 to $800,000	5	48	4,522,359	2,672,678	470	3,877.08	4,347.08	.0001039	.0009612
Chains with gross sales of $800,000 to $900,000	2	9	1,632,907	1,109,734	45	1,562.55	1,607.55	.00002757	.0009844
Chains with gross sales of $900,000 to $1,000,000	5	16	4,679,498	1,312,938	80	1,637.84	1,717.84	.00001709	.0003671
Chains with gross sales of over $1,000,000	15	471	54,556,506	39,066,434	32,765	297,540.70	330,305.70	.00060057	.006054
Grand Total	272	1238	$103,774,789	$63,877,490	$38,080	$320,326.20	$358,406.20	.0003086	.003453

It is worthy of note that the group of 108 chains with total sales of less than $100,000 each, have the lowest percentage of composite tax to total sales, namely, .000363, which is 363/10000 of one cent per dollar of sales. From here on there is, with one exception, a substantially steady rise in the rate of the tax as the chains grow larger in total sales, to the highest group, chains with sales of over $1,000,000 each, where the percentage is .006054, or 6054/10000 of a cent per dollar of sales.

The only substantial exception to the progression in the weight of the tax is found in the group with sales of $900,000 to $1,000,000, which is accounted for mainly by the fact that the law exempts from the tax on each chain the sales of one store of the owner's selection. Each of the five chains of this group had one store with very large sales. The result was that the exempt sales were very large and the taxable sales correspondingly small. It is further accounted for by the fact that each of the five chains in this group had only a few stores and hence the specific tax was very small.

There is, on the other hand, little relationship between the percentage of the specific tax and the total sales.

It seems apparent that the substantially steady progression toward a heavier tax per unit of sale of the composite tax is closely in line with the purpose of the act, to curb the undue expansion of all chain stores.

The specific portion of the tax curbs the undue expansion of chain stores large in number of stores. The composite tax curbs the undue expansion of all chains whether large in number of stores or large merely in total sales.

The foregoing facts show that the composite tax operates equitably. It imposes a heavier burden per dollar unit of

sale on the large chains than on the small and thereby tends to achieve the purpose of the act, to equalize the merchandising advantage of the large chain over the small chain.

Minnesota tax with its dual measure of size sustainable for the same reasons as chain store taxes based only on number of stores.

Every argument that can be presented to sustain the validity of a tax on chain stores graduated upward according to the number of stores is even more persuasive toward sustaining the validity of a tax graduated upward according to a dual measure, number of stores and gross sales. The chain store advantages found by the State District Court increase to a greater extent for each store added to a chain if that store has large gross sales than if its gross sales are small. In order to show that this is true let us consider one by one a number of these chain store advantages and its relation to increases in the total sales of the chain.

Economies in warehousing available to the larger chains.

One of the advantages of chain store merchandising found by the State District Court is large scale buying (R. 45, 78). This is an advantage which increases with the volume of purchase and becomes especially marked when the purchaser can take the carload for the unit and thereby take advantage of lower carload-lot prices. Obviously a chain of five stores and total annual sales of $100,000, while profiting to some extent by chain store advantages,

cannot profit by them to the same extent as if the average store in the chain had gross sales of $100,000 and the chain an aggregate of $500,000.

O. H. Landin, one of the witnesses for the State, was unusually well qualified to testify with reference to the comparative advantages of large and small scale buying in the grocery field. He had been in the grocery business for about thirty years, as an independent grocer operating his own store, as clerk, store manager and district manager in Chicago for the National Tea Company of Illinois, then for fifteen years successively as district manager, vice president, and general manager of the Minneapolis branch of the National Tea Company of Delaware, one of the respondents here. During most of this time he did all of the buying for the company. During this period he saw this chain grow from a chain of twelve or thirteen stores to a chain of about 215 stores. After leaving this company in 1933 he was, up to the time of trial, about two years, the owner and operator of a small food chain (R. 314-316). Mr. Landin, accordingly, had intimate knowledge from first hand experience of the business of the independent grocery chain, the small chain, the medium chain and the large chain, and fifteen years intimate acquaintance with the business of one of respondents. He knew, as few men know, the business advantages of chain store merchandising, particularly in the grocery field, and especially the enormous business advantages enjoyed by one of these respondents.

In his testimony Mr. Landin points out that the National Tea Company buys sugar in carload lots direct from the refiners and thereby effects three savings, below what is available to the small buyer: (1) a quantity discount,

which gives his company the jobber's price; (2) a special rebate, at times, below the usual price in carload lots; and (3) the privilege of "booking" the sugar many weeks before delivery, payment to be made at the time of delivery. He testifies that this "booking" privilege, that is, the privilege of ordering in advance without payment until delivery, is available only to carload lot buyers and that it is valuable because, on a rising market, a buyer with advance information of impending advances can buy before the advance takes place without tying up any money until the time of delivery (R. 317-318).

Purchase of soap in carload lots effects a saving of ten to twenty cents per box, amounting to a discount of from five to eight per cent (R. 318).

Flour is sometimes purchased in quantities as large as 10,000 to 20,000 barrels. This brings not only a quantity discount, but special bargain prices not available to small buyers (R. 319, 321).

Mr. Landin testifies that the National Tea Company maintains a research department and that the central office would inform him when it seemed advisable to "book" for future delivery (R. 317-318) and also when there was danger that the price of various commodities would fall, enabling him to put on special stock-reduction sales (R. 335). It is obvious that a chain with small gross sales cannot afford to maintain such a research department.

With reference to the purchase of coffee Mr. Landin states that the Great Atlantic and Pacific Tea Company, which is about ten times as large as the National Tea Company of Illinois, can buy coffee at even lower prices than the latter company because it maintains representatives at

places where coffee is grown and even has its own plantations, thereby effecting economies not open to a moderately large chain like the National Tea Company (R. 328).

Mr. Landin testifies that as purchaser for the National Tea Company he secured discounts on peaches, over smaller purchasers, of twenty-five to fifty cents per case. At times he secured still larger discounts by purchasing five carloads at a time. In answer to the question:

> "Would it (the amount of special rebates) depend on the amount of the purchase?"

Mr. Landin answered:

> "Yes, the larger the purchase, the better the deal you would be able to make" (R. 333-334).

Mr. Landin testifies that the National Tea Company receives special rebates from many companies by reason of large scale purchases and that the big chains customarily receive extra allowances, but the small buyers, including himself as the operator of a small chain, do not (R. 332).

Among the companies from which the National Tea Company got special rebates by reason of large scale purchases were Hills Brothers (R. 332, 565); Diamond Match Company (R. 369, 569); Wrigley Company and Lipton Co., Inc. (R. 371, 385, 569, 573-574); Kraft Phenix Cheese Company (R. 372, 570); Fleischmann Company (R. 381-382, 570, 572); Scott Paper Company (R. 384, 573); Campfire Corporation (R. 385,575); Pompeian Romanza Company (R. 386, 575); Fuji Trading Company, Washburn Crosby Company, Wheatena Company and Price Flavoring Extract Company (R. 388, 576); and Kraft Cheese Company (R. 389, 576-577).

An examination of the foregoing exhibits will show that they are substantial in amount, as the following tabulation will show.

No. of Exhibit	Name of Company	Amount paid special rebate for quantity purchase	No. of months covered	Year
3	Hills Brothers	$ 30.19	3	1931
15	Hills Brothers	17.25	3	1929
8	Diamond Match Co.	753.55	3	1929
9	Wrigley Company	26.95	1	1931
14	Wrigley Company	26.95	1	1931
14a	Wrigley Company	33.69	1	1931
14b	Wrigley Company	33.69	1	1931
9	Lipton Company	248.19	12	1930
10	Kraft Phenix Cheese	244.28	2	1931
12	Fleischmann Co.	144.37	1	1929
12a	Fleischmann Co.	118.73	1	1929
12b	Fleischmann Co.	146.73	1	1931
12c	Fleischmann Co.	134.88	1	1931
12d	Fleischmann Co.	121.78	1	1931
17	Fleischmann Co.	142.74	1	1930
13	Scott Paper Co.	9.19	1	1931
15	Campfire Corporation	7.13	1	1929
15	John F. Jelke Co.	15.75	1	1929
16	Pompeian Romanza Co.	65.69	6	1929
17	Fuji Trading Co.	19.00	8	1930
17	Price Flavoring Extract Co.	11.62	3	1930
17	Washburn Crosby Co.	66.78	3	1930
18	Washburn Crosby Co.	50.85	1	1930
18	Kraft Cheese Co.	253.05	2	1930

The Diamond Match Company paid quantity purchase rebates of $753.55 for a three-month period; the Fleischmann Co. monthly rebates during various months in 1929, 1930, and 1931 averaging about $135 per month and the Wrigley Company monthly rebates of from $26.95 to $33.69 per month.

Hills Brothers percentage of rebate for quantity purchases, as shown by Defendant's Exhibit 3, was 2½ per cent; Kraft Phenix Cheese Company, 3 per cent; Scott Paper Co., as shown by Exhibit 13, 5 per cent; Pompeian Romanza Company, 5 per cent. The rate of rebate for the other companies does not appear from the testimony. When we consider that a four per cent net profit on each tournover of stock represents about an average rate for chain stores, it is apparent how important can be quantity purchase rebates ranging as high as five per cent.

Mr. Landin testified that the National Tea Company received quantity rebates on about one half of the good purchased, figured on the basis of the cost of such goods, and that these were in addition to the usual quantity discounts (R. 393-394).

Joseph Strong, who had had forty years experience in the millinery business, in manufacturing, jobbing and retail, and thirty-five years experience as president and manager of the Strong Warner chain of millinery stores, and as buyer for the firm (R. 458-459), which at one time had 107 outlets (R. 460), testified that he effected large savings by making large purchases. He cited one case where he secured a reduction in the price of hats from $30 per dozen to $21 per dozen by purchasing 2,000 dozen hats in one order, a saving of $18,000. Such a purchase would, of

course, have been impossible to any retailer except a large millinery chain, for no other could dispose of such a number (R. 459-460). Testifying to the matter of progressively better bargains with larger purchases Mr. Strong testified as follows:

"Q. Did you find in connection with your quantity buying that you could get progressively greater discounts as you increased the quantity?

A. We didn't call them discounts but cut prices, it was a matter of bargaining.

Q. Could you get progressively better bargains if you increased the quantity?

A. If you were smart enough you could" (R. 460).

The importance of this testimony is that it shows that the large millinery chain, by reason of its power to make large scale purchases, enjoys an advantage over the small chain and the independent and that the advantage tends to become greater with an increase in the gross sales of the chain.

James Bailey, one of defendant's witnesses, had at the time of the trial been secretary of the St. Paul Retail Grocers Association for five years and, before that, had been salesman for a soap factory for thirty years and a director of the company for ten years (R. 454). He testified that he sold soap mainly to jobbers, sold soap directly to no independent stores and to no small chain groups, but did sell to two large grocery chains, the Red Owl and the National Tea Company. The National Tea Company purchased mainly in carload lots. The price advantage of the large grocery chain in the purchase of soap is shown by the following testimony of Mr. Bailey:

"Q. What was the price within limits?

A. It was changing all the time on the market. You got 10% off for the $4.00 box and then a discount over that was the jobber's list.

Q. So there was a quantity discount of a little more than 50¢ per box?

A. Yes.

Q. But the big grocery chains could buy from you direct?

A. Yes.

Q. And the independents could not get that because they could not purchase from you direct?

A. No." (R. 456)

The significant thing about this testimony is the fact that it shows that the National Tea Company could purchase soap in carload lots from a soap manufacturer and thereby secure a large quantity discount not open to the single store or the small chain. Thereby the National Tea Company by reason of its large sale of soap secured a lower price than the small dealer. It was the size of the chain measured in terms of gross sales that gave it this buying advantage.

Economies in advertising available to the larger chains.

Mr. Landin testifies that he secured very economical advertising because he could use one advertisement for all the stores in Minneapolis and run that in the Minneapolis newspapers, and similarly one for St. Paul; that newspaper advertising is far more efficient than handbills and that the independent merchant cannot use the newspaper because such advertising is too expensive for a single store (R. 336).

Economies in financing available to the larger chains.

Mr. Landin's testimony indicates that he effected considerable savings for his company by borrowing money from the parent company, the National Tea Company of Illinois, at from one to two per cent less than he could borrow it for at the bank. At one time he borrowed $25,000 from this source (R. 336-337, 566).

Howard R. Malcolm, one of the plaintiffs' witnesses, treasurer-comptroller of L. S. Donaldson Company, one of the two Minnesota stores of Allied Stores Corporation, a respondent here, testifies that in 1935 his company borrowed $2,748,883.03 from the parent company, $2,600,000 at one fourth per cent interest, and the balance at five per cent, and that earlier, when interest rates were higher, it had borrowed from banks at from four and one hal. to six per cent: This resulted in considerable saving to the L. S. Donaldson Company (R. 338-339). It is probable that the saving in interest on this item alone, resulting from a connection with a powerful chain, was more than the total composite tax levied on this chain. And yet this corporation comes into court to complain that the tax is excessive.

It appears from Mr. Landin's testimony that the National Tea Company could always get enough money to take cash discounts on purchases and buy in large quantities and get quantity discounts (R. 339-340).

Economies in warehousing available to the larger chains.

Mr. Landin's testimony shows that the National Tea Company effects economies in distribution by its system of central warehousing and that this method of warehousing is

not open to small grocery chains. We quote from his testimony:

"Q. Will you explain the method by which your company provided warehouse facilities?

A. We had our own warehouse, we owned that.

Q. How many did you have?

A. Just one for Minneapolis and St. Paul and that supplied the country stores, too, outside of Duluth. We have a small one in Duluth.

Q. How many did you maintain in the state?

A. Just the two.

Q. How many warehouses did you maintain for the four states?

A. Just two.

Q. How would the cost of providing a warehouse in this manner compare with the cost of providing it for a small chain, we will say such a chain as you now have?

A. I have no warehouse myself.

Q. Why do you not maintain warehouse facilities now?

A. I haven't volume enough, it wouldn't pay" (R. 340-341).

Advantage of large chains in advertising rebates.

Mr. Landin testified that many companies selling goods to National Tea Company granted the company advertising allowances, or rebates, to compensate it for money spent in advertising the goods of the companies granting such rebates. His testimony showed that independent dealers and small chains could not get such rebates and that such rebates increased in proportion to purchase with the larger purchases (R. 350-351). A portion of Mr. Landin's testimony follows:

"Q. Whether or not you know from your experience as manager of chain stores of various sizes, whether the advertising rebate tends to increase with the volume of purchase. Do you get a larger rebate when you buy in larger quantities?

A. Yes.

Q. Larger in proportion to purchases?

A. Yes.

Q. Did the National Tea Company have an advantage in doing business over the small chain and the independent store by reason of the fact that it could get this advertising rebate on account of its large purchases?

A. Yes" (R. 851).

Advantage of the large chains over the small chains in delivering goods to its stores.

Mr. Landin states that the National Tea Company, which operated stores in four states, Minnesota, Wisconsin, North Dakota and South Dakota, delivers merchandise from its two central warehouses, one in Minneapolis and one in Duluth, to all of these stores, each truck load taking care of the needs of its stores in from two to five towns. In this way the truck could carry a full load. Coming back the truck would carry a full load of eggs and empty crates and boxes. On the other hand, the rural district independents get most of their merchandise by railroad, a more expensive method. Mr. Landin testifies that this gives the National Tea Company an advantage over its small chain competitors (R. 352-353).

Volume of sales is what all merchants aim to reach. It is the usual unit of measure in describing the size of a business. Only with large volume of sales is a large profit pos-

sible. It seems extraordinary that when the tax levying authority seizes upon this as one unit of measuring the amount of a chain store tax levy the courts shall find it to be arbitrary and invalid.

The same comparison could be pursued through all the sixteen merchandising advantages enjoyed by chain organizations over single stores and by the large chain, in number of stores, over the small chain, and in nearly every case it could be shown that if we increase the average yearly sales per store in a chain we increase the merchandising advantage of that chain over another chain of the same numerical size but with small sales per store. But it is not necessary. This Court will recognize the validity of the argument as to the other chain store advantages without a detailed explanation. Moreover, to sustain this tax it is not necessary to show that the chain with larger gross sales per store has a large number of merchandising advantages over the chain of the same number of stores with smaller total sales per store. If it has three or two or even one substantial advantage that is sufficient to justify the subclassification set up by Section 2 (b) of the Act. It is elementary that classification for the purpose of taxation need not depend upon wide differences.

The combined rates of the Minnesota composite chain store tax are not confiscatory.

The State District Court found that National Tea Company enjoyed profit in percentages of gross sales as follows (R. 48):

Year	Percentage
1923	2.94
1924	4.39
1925	2.34
1926	2.51
1927	2.48
1928	.54
1929	1.48

For the year 1930 to 1934 it suffered losses as follows (R. 48):

Year	Percentage
1930	2.86
1931	2.78
1932	.26
1933	1.83
1934	1.97

This Court will take judicial notice of the fact that the profit years, 1923 to 1929, were normal years and the loss years, 1930 to 1934, were depression years. The suffering of losses during depression years, when that was the experience of all forms of business, can have no significance. When we remember that chain grocery stocks are turned on an average about eleven times per year (R. 221, 656-657)

it is apparent that the total profits of National Tea Company during normal years were substantial.

Plaintiff's Exhibit O (Record 221, 648), shows that nineteen department store chains, with total sales in 1933 of $905,509,800, had an average ratio of net profits to sales of 2.89% with a turnover of 5.5, and 3.08% in 1934, with a turnover of 6.2 (R. 221, 650, 651); that drug chains, with total sales in 1933 of $88,038,600, had an average ratio of net profits to sales of 3.38%, with a turnover of 6.0, and 4.93% in 1934, with a turnover of 6.1 (R. 221, 653-654); that eighteen grocery chains, with total sales in 1933 of $1,708,268,400, had an average ratio of net profits to sales in 1933 of 2.45%, with a turnover of 11.7, and 1.93% in 1934, with a turnover of 10.8 (R. 221, 656-657); that ten variety chains, with total sales in 1933 of $618,192,500, had an average ratio of net profits to sales of 6.91%, with a turnover of 6.9, and 6.85 in 1934, with a turnover of 7.3.

It is worthy of note that each of these four groups of chains, even in depression years, made very substantial rates of profit on each turnover and had turnovers of from 5.5 to 11.7.

It is apparent that the rates of the Minnesota composite tax, which at the highest are only slightly in excess of one per cent of total sales, is not confiscatory.

The existence of differences in profit margins between different chains does not render this tax invalid.

The fact that there may be wide variations in the profit margins between different kinds of business and different kinds of merchandise, and wide differences in the rate of net profit made by different concerns in the same line of

business for a given period and wide variations made by the same concern in any given line of business from year to year and from time to time, as found by the State District Court (R. 50, 83), does not argue against the validity of the tax nor render it arbitrary. Exactly the same variations in profits and rates of profit of chain store groups is present whether the measuring rod used in levying the tax is number of stores or the dual measure of the Minnesota tax. The Indiana, the Florida, the West Virginia and the Louisiana taxes cut across the line of profit quite as much as the Minnesota tax, and yet were upheld by this Court. Mr. Justice Cardozo made this point in his dissent in the Stewart case, supra, saying (p. 579):

> "Classification in those cases (the Indiana, Florida and West Virginia chain store tax cases) ran athwart the line of profit, yet it was none the less sustained."

There are other valid reasons why such variations in profits do not render such a tax as this arbitrary. Variations in profit margins between different kinds of business can afford no basis for complaint, for the difference between different kinds of business is itself a valid basis for classification. If the legislature, for example, wishes to let the tax fall more heavily on the millinery chains than on the food chains, that is a matter within its power and in nowise arbitrary. Variations in profit margins between different concerns in the same line of business can afford no basis for complaint. The same variations in profit margins exist in connection with the levying of every tax. This tax is not based on net income and the rules of the net income tax no more apply to this tax than to any other tax that is not a net income tax.

Variations in the net income of the same concern from year to year do not render this tax arbitrary. If a state had to vary its taxes with the net income of its people, government could collect little revenue in depression years, when its need for revenue is the greatest.

The sale of a given quantity of goods by a chain with large total sales differs substantially from the sale of the same quantity of goods by a small chain. This difference may properly be made the basis of classification for the purpose of taxation.

When the Supreme Court of Minnesota quotes with apparent approval the finding of the State District Court to the effect that the Act taxes different persons at different rates for the privilege of doing the same act, it fails to take note of the fact of common knowledge, supported by the District Court's findings, that large chains enjoy great advantages over small chains in merchandising and do not carry on their business in the same manner as small chains. These advantages have been stated and explained. We need not repeat them here.

In the Grosjean case, supra, p. 422, this Court calls special attention to the advantages resulting from large volume of purchasing power and points out that this is a matter of common knowledge. We quote:

> "The record discloses *what would be plain enough without evidence*, that generally volume of purchasing power spells lower prices, special terms, and other advantages." (Italics ours.)

In support of this statement the Court refers to the fact that the Great Atlantic and Pacific Tea Co. collected $8,-

105,000 in secret rebates from its vendors in one year. It is too apparent for extended argument that the sale of a given quantity of goods by such a company is not the same act as the sale of the same quantity of goods by a small chain.

It is likewise apparent that these differences in merchandising between chains with large sales and chains with small sales, with great advantages in favor of the larger chains, make a reasonable basis for classification for the purpose of taxation.

POINT 4.

A state may use its taxing power to restrain the growth of monopolies.

Even since our nation came into being it has been recognized that a state in the exercise of its police power may pass laws to restrain the growth of monopolies. If so evident a proposition needs support it may be found in the decision of this Court in Crescent Oil Company v. Mississippi, 257 U. S. 129, upholding a Mississippi statute prohibiting companies manufacturing cotton seed oil from operating cotton gins. This Court said:

> "that the law assailed was enacted by the State in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by the State in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based on the equal protection of the laws clause of the Fourteenth Amendment, and also that every state of facts sufficient to

sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed."

In this case a law directly prohibiting a combination of businesses deemed to tend toward monopoly was sustained because of its monopolistic tendency. But this Court has held in the Grosjean case, supra, p. 426, that:

"Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege and such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities."

Facts presented in other parts of this brief show that chain store groups are gradually taking over a larger and larger percentage of the retail merchandising of this country, and of the state of Minnesota. The State District Court's findings show that fifteen Minnesota chains have aggregate yearly sales in Minnesota of more than $1,000,000 and four have aggregate sales of more than $4,000,000 (R. 44). The total sales of these fifteen chains in Minnesota was $39,066,434 in 1934. Most of these chains being national chains it is evident that Minnesota sales represented only a small portion of the total sales.

It therefore appears that when the Act was passed the chain-store method of merchandising was tending toward a monopoly. It was proper for the legislature to take note of that fact and exercise its police power and its taxing power to counteract this tendency. It levied a tax particularly well adapted to curbing the undue expansion of all large chains, not only those that are large, powerful and destructive to independent stores because they have a great

number of stores, but those that attain great power and great capacity to injure weaker competitors by reason of enormous sales from a few stores. The largest chain in Minnesota in total sales is a two-store chain, Allied Stores Corporation, a respondent here.

It follows that the act is valid as a proper exercise of the state's police power to prevent the spread of monopoly.

POINT 5.

This Court's decision in the case of Valentine v. Great Atlantic and Pacific Tea Company, is erroneous and should be overruled.

During the past nine years five cases involving the validity of acts imposing progressive taxes on chain stores have been decided by this Court. These cases are the following:

State Board of Tax Commissioners v. Jackson, 283 U. S. 527.

Liggett Co. v. Lee, 288 U. S. 517.

Fox v. Standard Oil Co., 294 U. S. 87.

Valentine v. Great Atlantic and Pacific Tea Company, 299 U. S. 32.

Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412.

For brevity these cases will be referred to as the Jackson case, the Liggett case, the Fox case, the Valentine case, and the Grosjean case. In four of these cases the tax under attack was a progressive tax based on the number of stores

in the chain. The progressive character of these taxes was held valid on two grounds:

1. Increased chain store advantages resulting from adding stores to the chain justify subclassification and a progressively higher tax on larger chains.
2. Taxation may be made the means of the exercise of the state's police power and may be used to discourage the undue expansion of chains, and to encourage the development of other forms of industry. Grosjean case, pp. 426-427.

In the fifth case, the Valentine case, which involved a progressive tax on chains measured by two yardsticks, number of stores and gross sales, very similar to the Minnesota tax, the tax was held invalid on authority of Stewart Dry Goods Co. v. Lewis, 294 U. S. 550. We respectfully contend that this decision was unsound for the following reasons:

1. The decision in the Stewart case was not pertinent to the facts in the Valentine case.

In the Valentine case the court passed upon the validity of a progressive tax on chain stores measured by number of stores and gross sales. In the Stewart case the court considered a progressive tax on substantially all retail sales whether made by chain stores or independent retailers. It follows that important consideration of increased chain store advantage resulting from increased size were present in the Valentine case and could properly be made the basis for classification, but were not present in the Stewart case. Therefore the holding of this Court in the Stewart case should not have ruled the Valentine case.

In rendering its decision in the Stewart case this Court took pains to explain that the tax involved was not a chain store tax, the inference being that the decision would have been otherwise had a chain store tax of a similar character been involved.

The Court said (pp. 555-556):

> "The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class."

Later in the opinion the Court added (p. 565):

> "In several recent cases (referring to three chain store tax cases) we sustained the classification of chain stores at rates higher than those applicable to single stores, and graduated upward on each store as the total number of units in one ownership increased. We found this classification reasonable because of advantages incident to the conduct of multiple stores and obvious differences in chain methods of merchandising as contrasted with those practiced in the operation of one store. The instant cases present a classification of quite another kind. The Kentucky statute ignores the form of the organization and the method of conducting business. The taxable class is retail merchants, whether individuals, partnerships or corporations; those who through departments deal in many lines of merchandise."

2. There is no difference in principle between a progressive tax on chain stores based on size, size being measurde by the number of stores in the chain, and a progressive tax on chain stores based on size, size being measured by two yardsticks, number of stores and total sales.

We have set forth the reasons for this statement under Point 3. Here we merely wish to add that every reason that can be presented for sustaining a progressive chain store tax based on the number of stores argues as persuasively for sustaining a progressive chain store tax based on number of stores and total sales. The argument is even more convincing when applied to the dual tax, for while the specific tax allows certain chains with large sales but few stores substantially to escape taxation, the composite tax reaches all chains on an equitable basis.

It is apparent that the great purchasing power which commands increasingly great quantity discounts and special rebates is equally valuable whether it results from a great number of stores in one organization or from enormous sales from a few stores. It cannot be arbitrary for the tax-levying authority to take note of this fact and levy a tax which reaches both classes of chains.

3. The decision in the Valentine case unduly restricts legislatures in their choice of means in taxing chain stores.

In raising revenue and in restricting the undue expansion of chain stores the legislature is equally interested in reaching the chain that has great chain store advantages and correspondingly great power to injure competitors by reason of its great number of stores and the chain that has such advantages and such power by reason of enormous sales from a few stores. Montgomery Ward & Co., with total sales in Minnesota in 1934 of $6,777,204 from sixteen stores, paid a specific tax of $135, a nominal amount having no appreciably restrictive effect. Nor could any tax based on the number of stores have produced much revenue or had a substantially restrictive effect on such a chain,

with average annual sales per store of more than $400,000, without destroying the average chain, with much smaller annual sales. On the other hand, the gross sales tax of $29,138.12 on this company was substantial (R. 89, 592).

J. C. Penney Co., with 62 stores and gross sales in Minnesota in 1934 of $7,040,243, paid a specific tax of $4,105 and a gross sales tax of $60,140.62, a total tax of $64,235.62. (R. 89, 593). If Minnesota must limit its chain store tax to the specific tax on stores, its tax on Montgomery Ward & Co., with annual sales of nearly $7,000,000, becomes only $135, whereas its tax on the Penney Co., with sales not far from the same, will be $4,105, or thirty times as much. On the other hand, if the composite tax is upheld, the Ward and the Penney taxes will be respectively $29,273.12 and $64,245.62.

It seems clear that there is a closer correspondence between the amounts of the composite taxes on these two chains and their respective chain store advantages than between the amount of the specific taxes on these chains and their respective chain store advantages. It seems equally clear that there is a closer correspondence between the amounts of the composite taxes on these chains and their respective power to injure competitors than between the amounts of their specific taxes and their power to injure competitors. Yet this Court (in the Valentine case) and the Minnesota courts (in these cases) declare the composite tax to be arbitrary and invalid and the specific tax to be unobjectionable. We cannot understand how a court can properly strike down as arbitrary a tax which in actual operation is seen to approach closer to the ideal of absolute fairness and uphold as valid a similar tax which falls farther short of reaching that ideal.

4. The Valentine case has tacitly been overruled by the Grosjean case.

This proposition will be discussed under Point 7.

POINT 6.

This Court is asked to reconsider and overrule its decision in the case of Stewart Dry Goods Co. v. Lewis if it shall deem the decision in that case controlling in these.

A progressive tax on retail stores, whether chain stores or independent, based on total sales, was held invalid in the case of Stewart Dry Goods Co. v. Lewis, 294 U. S. 550. In holding invalid the Iowa composite chain store tax, based partly on number of stores and partly on gross sales, on authority of the Stewart case, this Court in effect has held that a progressive tax on chain stores based on this dual measure is not distinguishable in principle from a progressive tax on retail stores generally based on total sales. We have shown under Point 5 that there are substantial reasons for distinguishing the two cases. However, if this Court is still of the opinion that the two kinds of taxes are not distinguishable in principle it becomes material in this argument to set forth the reasons why this Court's decision in the Stewart case should be overruled.

That decision was made by a divided court, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissenting.

The Kentucky law under attack in the Stewart case imposed a progressive sales tax on substantially all retailers. That act was held to be in violation of the equal protection clause of the Fourteenth Amendment primarily because, in the opinion of the Court, classification for taxation on the

basis of gross sales is not based on a reasonable relationship between the amount of the tax and the privilege taxed.

Mr. Justice Cardozo, speaking for the three dissenting justices, takes the position that there is good authority for believing that a reasonable relationship exists between the amount of business done and capacity to pay. At the beginning of his dissenting opinion he says:

> "In the view of the majority, the relation between the taxpayer's capacity to pay and the volume of his business is at most accidental and occasional. In the view of the legislature of Kentucky and its highest court (Moore v. State Board of Charities and Corrections, 239 Ky. 729; 40 S. W. (2d) 349), the relation, far from being accidental or occasional, has a normal or average validity, attested by experience and by the judgment of trained observers. The one view discovers in the attempted classification an act of arbitrary preference among groups essentially the same. The other perceives in the division a sincere and rational endeavor to adapt the burdens of taxation to the teachings of economics and the demands of social justice."

Mr. Justice Cardozo finds that "a theory readily intelligible, whether sound or unsound, underlies the adoption of the graduated levels," namely, "that there is a minimum of size for business units below which efficiency is less on the average than expansion would tend to make it; that there are intermediate levels within which efficiency is subject on an average to progressive development; and that there is an ultimate level beyond which efficiency, even if promoted, goes forward more slowly and at a diminishing ratio." (294 U. S. 567).

The social theory underlying the tax, in the view of the dissenting judges, is that the man with a small business,

because of inferior capacity to pay, should bear the lighter burden (294 U. S. 567).

Mr. Justice Cardozo points out that in prior chain store tax cases classification ran athwart the lines of profit, yet was sustained (294 U. S. 579).

The three dissenting justices find an impressive body of opinion in the field of economics holding that a flat rate tax bears more heavily upon the small business than the large one. Commenting upon this view they say:

> "For that reason the flat rate is thought to be less efficient than the graded one as an instrument of social justice. The large dealer, it is said, occupies, both absolutely and relatively, a position of economic superiority by reason of the volume of his business. In that view, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus arrive in the end at a more genuine equality. * * * It is not the function of a court to make itself the arbiter between competing economic theories professed by honest man on grounds not wholly frivolous. Otis v. Parker, 187 U. S. 606, 609. Responsibility for economic wisdom has been laid upon the legislature. There is finality in its choice, even though wisdom may be lacking, unless choice can be found to be so void of rationality as to be the expression of a whim rather than an exercise of judgment." 294 U. S. 569-570.

In discussing further the question whether there is rationality in the belief that capacity to pay increases, by and large, with increased receipts, Mr. Justice Cardozo aptly points out that merchants constantly act upon that faith, that but for that faith "there would be an end to the hot pursuit after wider markets."

Answering the contention that as between one business and another or between one person and another person in the same line of business a progressive sales tax results in various rates of return, Mr. Justice Cardozo points out that this is as much true of the income tax. One person's net earnings of $100,000 may be the return on capital of $2,000,000 and another person's net earnings may be the return on twice as much capital. Yet they pay the same tax (294 U. S. 571).

We believe a progressive tax on retail sales, general in application, is sustainable for the following reasons:

1. Capacity to pay is recognized as a proper basis for taxation.
2. Generally speaking, the larger the total sales of a business, whether chain store or independent, the greater is the net income and the greater the capacity to pay.
3. Such a tax is as close an approximation to capacity to pay as most of the taxes that are sustained without question.
4. Practical considerations make it necessary to accept approximate correspondence between the amount of taxes and the various purposes that actuate the state in levying the tax. The apportionment of taxes is as complex as the complexity of present-day civilization. While capacity to pay is now generally recognized as one of the guiding principles in levying taxes, there are often, as in the levying of chain store taxes, police power considerations that are more important than mere revenue. There are even general welfare considerations that enter into the selection of capacity to pay as a guide. All of these are more or

less intangible things, incapable of exact mathematical statement. It follows that when the legislature classifies taxable subjects for the levying of a tax it must in the nature of things be satisfied with an approximate approach to an equitable apportionment, taking into account the various purposes for which the tax was levied.

5. In the exercise of the police power the legislature may properly levy a tax graduated in such a manner as to encourage the development of businesses of moderate size and restrict the development of businesses of great size.

This proposition has been discussed under Point 1.

POINT 7.

The decision of the Supreme Court of Minnesota in the present cases is not in harmony with the decisions of this Court.

The decision of the Supreme Court of Minnesota is contrary in principle to four of the five chain store tax decisions of this Court. The only chain store tax decision of this Court which may be deemed to support the Minnesota Court is the decision in the Valentine case, supra. That decision held invalid a progressive tax on chain stores measured by gross sales, a tax similar to the Minnesota tax. But the decision in the Grosjean case is subsequent to the decision in the Valentine case. It follows that if we are correct in our contention that there is no difference in principle between a progressive tax on chain stores measured by the number of stores in the chain and a progres-

sive tax on chain stores measured by gross sales, the Grosjean case tacitly overrules the Valentine case and upholds the validity of the Minnesota tax.

If the state can levy a progressive tax on chains based on size, using number of stores as the yardstick, it can levy a progressive tax on chains based on size, using gross sales as the yardstick, and it can levy a progressive tax on chains using both as the combined yardstick. This must be so unless there are unfair and arbitrary qualities in gross sales as a measure of chain store advantages and chain store power to cause injury to the general welfare not found in number of stores as a measure. The most casual examination of the evidence in these cases will show that the combined yardstick, number of stores and gross sales, used in the Minnesota tax, bears a much closer relation to chain store advantages and chain store power to cause social and economic injuries, than does the single yardstick, number of stores.

We give below the amount of gross sales, the number of stores, the amount of the specific taxes, and the amount of the combined taxes of the two plaintiffs for the year 1934 (Original Exhibit A, pp. 3 and 5):

	Gross Sales	No. of Stores	Specific Tax	Composite Tax
Allied Stores Corporation	$9,714,374	2	$ 5	$40,907.38
National Tea Company	$5,288,845	154	$18,520	$63,742.51

These figures speak for themselves. The specific taxes of the Allied Stores Corporation compares with the specific taxes of National Tea Company as 1 to 3704, the com-

posite tax, approximately, as 40 to 63. National Tea Company, with annual gross sales of a little over $5,000,000 cannot enjoy chain store advantages or chain store power to cause social and economic injuries 3,704 times as great as Allied Stores Corporation, with annual sales of nearly $10,000,000. But the proportion of 64 to 41 is presumably approximately accurate.

An examination of the tax levy on more than 300 chains which operate in Minnesota, as shown by Original Exhibit A, will show that in substantially every case the composite tax which the Minnesota courts condemn as arbitrary operates more equitably than the specific tax which they upheld.

This Court, in the Grosjean case, the last chain store tax case passed upon by this Court, held valid a progressive specific tax on chain stores based on the number of stores in the chain. That is the case which should govern the decision of the Supreme Court of Minnesota. There being no difference in principle between a progressive tax based on number of stores and a progressive tax based on both the number of stores and gross sales, unless the addition of the gross sales portion makes the composite tax more arbitrary than the specific tax, it follows that this Court, in upholding the progressive tax on the chain stores of Louisiana, based on the number of stores, in effect upheld the composite tax of Minnesota, unless there are arbitrary features in the composite tax not present in the specific tax. But an examination of the composite tax of Minnesota shows conclusively that the composite tax approaches much closer to the ideal of absolute fairness than does the specific tax standing alone.

The emphasis placed by this Court in the Grosjean case upon police power considerations further emphasizes the

fact that the decision in the present case is not in harmony with the decisions of this Court in the Grosjean case. In the latter case this Court says (p. 425):

> "Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction * * *. Taxation may be made the implement of the exercise of the state's police power; * * *.
>
> "If in the interest of the people of the state, the legislature deemed it necessary * * * to neutralize the disadvantages of small chains in their competition with large ones, or to discourage merchandising by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation."

It is evident that if the Louisiana legislature, in the exercise of the State's police power, may discourage the growth of chains grown so large in number of stores as to become a menace to the general welfare, the Minnesota legislature, in the exercise of the police power of Minnesota, may discourage the growth of chains grown so large in gross sales as to become a menace to the general welfare. Both classes of chains threaten to destroy the business of tens of thousands of independent merchants. They are equally subject to the state's police power and the state's taxing power. If the legislature desires to protect the independent merchants from this menace, and the weak chains from the strong, the court should not interfere.

POINT 8.

There is a reasonable relationship between the tax and the purposes of the Act.

It is a matter of common knowledge that the Minnesota chain store tax was levied for a dual purpose, to raise revenue and to curb the undue expansion of chain stores. The title of the act refers to it as "An act raising revenues, imposing a tax on conducting business by the system of chain stores." Implicit in the selection of chain stores for the imposition of a tax from which all independent stores are free is the police power purpose of restricting the undue expansion of chain stores. The progressive rates make that purpose clearer.

The one objection made by the Supreme Court of Minnesota to a progressive chain store tax measured by gross sales is the absence of a close relationship between the amount of the tax and the net profit resulting from gross sales. We contend that in levying a chain store tax for the dual purpose of raising revenue and curbing the undue expansion of chain stores there need not be a close relationship between the amount of the tax and the amount of net profit. In fact, if the correspondence between the amount of the gross sales tax and the amount of net profit is very close, the act can have but little effect in restraining the undue expansion of chain stores. It is only when the tax begins to cut severely into profit that the restraining influence becomes effective.

What we must have in order to satisfy the requirements of "equal protection" is a reasonable relationship between the progressive rate of the tax and the dual purpose of the

act. Clearly we have that relationship in the Minnesota Act. The gross sales tax on chains with small sales (less than $100,000 per year), and therefore small chain store advantages and little power to injure competitors, is very light, 1/20 of one per cent. This steps up gradually, as chain store advantages and power to injure competitors increase with increased gross sales, to one per cent for that portion of gross sales above $1,000,000. (Sec. 2 b of the Act).

We must remember that the gross sales portion of this tax is not based on net income, but is based, exactly as is the specific portion, on the fact that chain store advantages and chain store capacity for injuring competitors, increase with size. There is no exact correspondence between the amount of a progressive chain store tax measured by the number of stores and the amount of net income. Every year there are many chains that make no profit. During depression periods a considerable portion of the chains make no profit. Yet this Court has not held that to be a valid objection to the constitutionality of a progressive tax based on the number of stores in a chain. It follows that the gross sales portion of the Minnesota tax should not be held invalid although there is no exact correspondence between this portion of the tax and net income.

The propriety of taxing chain stores in such a way as to restrict profit has been recognized by this Court. In the case of Fox v. Standard Oil Co., supra, this Court says (p. 100):

> "A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of component links; and the greater

they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, * * *. Not only may it do this, but it may make the tax so heavy as to discourage the multiplication of units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry."

We have heretofore quoted this Court's opinion in the Grosjean case to the same effect.

POINT 9.

The Minnesota chain store tax is a privilege tax.

The State District Court in effect declares the Minnesota Chain Store Tax to be a privilege tax when it says in its Conclusions of Law (R. 51, 84):

> "This act imposes a composite occupational tax upon persons engaged in conducting business within the state by a system of chain stores."

This Conclusion of Law stood unchallenged before the Supreme Court of Minnesota. Moreover, an examination of the Act shows that the tax was laid "on conducting business by the sy tem of chain stores." (See Title of Act and Section 1 (j). This is a clear announcement in the act itself that it is laid for the privilege of conducting business as a chain store organization.

Accordingly, when the Supreme Court of Minnesota, in its opinion, p. 448, says:

> "Nor is it a privilege tax, since the amount of tax bears no relation to the value of the privilege",

the court apparently means merely to say that it is not a valid privilege tax. If the statement were intended to be a characterization of the tax as not levied for the privilege of conducting business by the system of chain stores it would obviously not be in accordance with the facts as revealed by an examination of the Act. Nor was there any evidence whatsoever presented to show that the tax is not a privilege tax.

POINT 10.

This Court should render a final decision.

In a case where, as in these cases, a State Supreme Court has decided a matter on the basis of a provision of the Federal Constitution which is controlling, there may still, as in these cases, be a state matter involved. In such cases this Court has held that it has authority to decide all questions, state and federal, but in practice has generally sent the case back to the state court for action on the state matter. This obviously is the appropriate procedure in many cases.

In these cases, however, if this Court shall hold the Act valid under the first section of the Fourteenth Amendment, there will be nothing left for the Minnesota Supreme Court to decide. That court has already said explicitly in the case of Reed v. Bjornson, 191 Minn. 254, 261, 253 N. W. 102, 105, that the equal protection clause of the Fourteenth Amendment and the equality of taxes clause of the Minnesota constitution impose identical restrictions upon the state legislature with respect to classification in the field of taxation. The Supreme Court of Minnesota has reaffirmed that conclusion in these cases, National Tea Company v.

State, Allied Stores Corporation v. Same, 205 Minn. 443, 447. We quote:

> "Under U. S. Const. Amendment, XIV, S. 1, it is provided that, 'no State shall * * * deny to any person within its jurisdiction the equal protection of the laws.' Minn. Const. art. 9, S. 1, provides: 'Taxes shall be uniform upon the same class of subjects, * * *.' In Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102, we held that these provisions of the federal and state constitutions impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation."

Under this state of facts all questions at issue will be decided when this Court shall have decided the validity of the Act under the equal protection clause of the Fourteenth Amendment. If the act is valid under the equal protection clause of the Fourteenth Amendment it cannot conceivably be invalid under a provision of the state constitution identical in restrictive effect. It would therefore be a mere formality to send the case back to the state court for action.

Moreover, this Court has itself passed upon the question of the identity of the restrictive effect of the Fourteenth Amendment and the equality of taxes clause of the Minnesota constitution. In Lake Superior C. I. Mines v. Lord, 271 U. S. 577, 581, this Court says:

> "The only provision of the Minnesota Constitution which undertakes to limit the power of taxation, is in article 9, S. 1: 'Taxes shall be uniform on the same class of subjects, and shall be levied and collected for public purposes.' The state courts have said nothing to the contrary, and it seems to us sufficiently plain that this provision goes no further than the 14th

Amendment. Consequently, if the legislation under review does not offend that Amendment there is no conflict with the state Constitution."

This Court should therefore render a final decision.

CONCLUSION.

The problem of curbing the menace to the general welfare caused by the undue expansion of chain stores is a problem common to every state. Other states have approached this problem by levying progressive taxes on chain store groups based on the number of stores in the chain. These taxes effectively reached the chains which were large and powerful by reason of having a large number of stores, but did not and could not reach the chains which were large and powerful by reason of having enormous sales from a few stores.

The largest chain in Minnesota in point of total sales is a two-store chain. A tax based on the number of stores did not and could not reach such a chain. The Minnesota legislature took note of the fact that the true size of a chain is two-dimensional, depending in part on the number of stores and in part on the total sales of the chain. It passed an act based on these facts. That act in practice has worked far more equitably than any tax based on number of stores only can possibly work. This tax reaches such a chain as Allied Stores Corporation and similar chains with enormous sales but few stores with a tax commensurate with the chain store advantage of such chains and commensurate with the power of such chains to injure the general welfare. In doing so the state has not acted in an

arbitrary manner. The resulting tax operates in a manner more nearly approaching the ideal of absolute fairness than does the specific tax based on number of stores only.

The principle of progressive taxation of chain stores on a basis related to their chain store advantages and their chain store power to cause injuries to the general welfare has been accepted by this Court in a long line of decisions. The last chain store decision of this Court, the Grosjean case, supra, upholds this principle. It emphasizes the police power aspects of this tax and says that in such a case its "decision need not rest on conceptions of subject, measure and rate of tax" but on "much broader considerations touching the state's internal policy of police."

Approaching the consideration of the Minnesota Act on the same broad considerations touching the State's internal policy of police this court will find that the composite tax levied by the Act is closely related to the purposes of the Act, is not arbitrary, and is valid.

We respectfully submit that the gross sales portion of the Minnesota Chain Store Tax levied by Chapter 213 of the Session Laws of Minnesota of 1933, as amended, is valid under Section 1 of the Fourteenth Amendment to the Constitution of the United States and under Section 1 of Article 9 of the Constitution of the State of Minnesota and

that therefore the judgments of the Supreme Court of Minnesota and of the District Court of Ramsey County, Minnesota, should be reversed.

Respectfully submitted,

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APPENDIX.

EXHIBIT "A".

SESSION LAWS OF MINNESOTA FOR 1933

CHAPTER 213.

An act raising revenues, imposing a tax on conducting business by the system of chain stores for selling or otherwise disposing of goods, wares, articles or commodities at retail, with certain exceptions providing for the assessment and collection thereof, and for the distribution of the proceeds therefrom, providing penalties for failure to pay such tax, defining certain crimes in connection with the enforcement of such tax, and appropriating money for the administration of this Act.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Definitions.—(a) The term "person", when used in this Act, shall include individuals, partnerships, trusts, associations, joint stock companies, corporations, and firms however organized or whatever be the plan of operation.

(b) There is hereby imposed upon every person engaged within the State of Minnesota in conducting a business by the system of chain stores from any of which are sold or otherwise disposed of at retail any goods, wares or merchandise, excepting any person selling at retail one or more of the following—fuel, lumber, building material, gasoline and

oils, and grain, if the gross sales of any such person from such produce or products shall, during any year for which the tax is imposed, equal or exceed 95 per centum of the total gross sales from all sources of any such person, and excepting cooperative associations organized under the laws of this State in good faith and not for the purpose or with the intent of evading the tax hereby imposed, an annual tax for each calendar year during any part of which such taxpayers shall be so engaged, which tax shall be computed as hereinafter provided for.

Sec. 2. Rate of Tax.—The tax imposed by Section 1 shall be equal to the sum of the amount due under the provisions of subdivision (a) and the amount due under the provisions of subdivision (b) of this section 2, as follows:

(a) A specific amount to be determined as follows:

(1) $5.00 for each store in excess of one and not in excess of 10 if said business is conducted at not in excess of 10 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(2) $15.00 for each store in excess of 10 and not in excess of 20 if said business is conducted at in excess of 10 but not in excess of 20 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(3) $35.00 for each store in excess of 20 and not in excess of 30 if said business is conducted at in excess of 20 but not in excess of 30 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(4) $65.00 for each store in excess of 30 and not in excess of 40 if said business is conducted at in excess of 30 but not in excess of 40 stores or mercantile establishments within this state under a single or common ownership, supervision or management.

(5) $105.00 for each store in excess of 40 and not in excess of 50 if said business is conducted at in excess of 40 but not in excess of 50 stores, or mercantile establishments within this state under a single or common ownership, supervision or management.

(6) $155.00 for each store in excess of 50 if said business is conducted at in excess of 50 stores or mercantile establishments within the state under a single or common ownership, supervision or management.

(b) An amount based on the combined gross sales in excess of the exemption set forth in Section 4, of said business at all stores or mercantile establishments within this state under a single or common ownership, supervision or management, but which shall be computed by applying the following rates to the specified portions of such entire or combined gross sales in excess of said exemption.

(1) 1/20th of one per cent on that portion of the gross sales not in excess of $100,000.00.

(2) 2/20ths of one per cent on that portion of the gross sales in excess of $100,000.00 but not in excess of $200,000.00.

(3) 3/20ths of one per cent on that portion of the gross sales in excess of $200,000.00 and not in excess of $300,000.00.

(4) 4 20ths of one per cent on that portion of the gross sales in excess of $300,000.00 and not in excess of $400,000.00.

(5) 5 20ths of one per cent on that portion of the gross sales in excess of $400,000.00 and not in excess of $500,000.00.

(6) 6 20ths of one per cent on that portion of the gross sales in excess of $500,000.00 and not in excess of $600,000.00.

(7) 8 20ths of one per cent on that portion of the gross sales in excess of $600,000.00 and not in excess of $700,000.00.

(8) 10 20ths of one per cent on that portion of the gross sales in excess of $700,000.00 and not in excess of $800,000.00.

(9) 12 20ths of one per cent on that portion of the gross sales in excess of $800,000.00 and not in excess of $900,000.00.

(10) 15 20ths of one per cent on that portion of the gross sales in excess of $900,000.00 and not in excess of $1,000,000.00.

(11) One per cent on that portion of the gross sales in excess of $1,000,000.00.

Sec. 3. Definitions.—The terms "store" and "mercantile establishment" shall mean any fixed place at which said business is conducted even if said place is at the same time being used for other purposes. Conducting a business by the system of Chain Stores shall mean conducting such business from two or more stores under a single or common ownership, supervision or management. Two or more

stores or mercantile establishments shall, for the purposes of this Act, be treated as being under a single or common ownership, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such stores or mercantile establishments, or if any part of the gross revenues, net revenues, or profits from any such stores or mercantile establishments shall directly or indirectly be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single person or any group of persons having a common interest therein.

Sec. 4. What are gross sales.—The term "gross sales" shall mean the money value of the consideration received or receivable by the vendor or transferror from the vendee or transferee from every retail sale or transfer made in connection with the business upon which the tax levied by Section 1 is imposed, excepting gross sales of goods, the sale of which at retail is excepted from the tax as provided in Section 1 (b), even when sold at stores, sales from which are subject to the tax hereby imposed. The amount thereof shall be determined in accordance with the method employed by the taxpayer in keeping his accounts. A taxpayer keeping his account on an accrual basis shall be permitted in each year to deduct a reasonable amount to care for bad debts attributable to the business for such year, subject to correction by including recoveries in gross sales for the year of recovery. A taxpayer keeping his accounts on the cash receipts and disbursements basis shall include the gross receipts from sales in the gross sales of the year

of their receipt regardless of the year in which the sale was made. A taxpayer may, with the consent of the State Tax Commission, keep his accounts on the installment basis if such method properly reflects the gross sales of his business for any year, and said Commission may prescribe rules to insure that such taxpayers shall properly allocate gross sales as between successive tax years. Gross sales shall not include the consideration received by a vendor from a purchaser if the sale is made from a store or mercantile establishments in this state to a purchaser residing without this state unless the purchaser is present within this state at the time of such sale and purchase. The tax imposed by Section 1, so far as measured by gross sales, shall be measured by the gross sales of the year for which the tax is imposed; provided, however, there shall be exempted from the total aggregate gross sales of any such business in each tax year the gross sales from that one of all the stores or mercantile establishments within this State under a single or common ownership, supervision or management, which the person on whom the tax is imposed shall select if the State Tax Commission is notified thereof prior to the first day of February of the year for which the tax is imposed, provided, further that as to the tax for 1933, such notification may be made on or before July 1st, 1933.

Sec. 5. Computation of tax.—The tax imposed hereby so far as measured by Section 2-(a) shall be computed on the basis of the number of stores under a single or common ownership, supervision or management on July 1st of each tax year.

Sec. 6. Tax period to begin July 1, 1933.—The first year for which this tax is hereby imposed shall be the period commencing with July 1st, 1933, and ending with December 31st, 1933. The tax imposed, so far as measured in accordance with Section 2-(a) shall for that period be due and payable on or before July 1st, 1933, and that portion of such tax so far as measured by Section 2-(b) shall be due and payable on or before January 20th, 1934.

Sec. 7. Date payable.—The tax imposed by Section 1 shall be payable as follows:

(a) That portion thereof measured by Section 2-(a) shall be paid on or before January 20th of each year.

(b) That portion thereof measured in accordance with Section 2-(b) shall be paid on or before January 20th of the year succeeding that for which imposed or within 30 days after any person liable for such tax shall cease entirely to do business within this state of the kind on which the tax is imposed.

Sec. 8. Return to Tax Commission.—Every person on whom a tax is imposed by Section 1 shall make a return of his gross sales for the year for which the tax is imposed to the State Tax Commission on forms to be prepared by the Commission, and to be furnished him by said Commission. Said return shall be filed with the State Tax Commission on or before January 20th of the year following the year for which the tax is imposed or within 30 days after any such person shall cease entirely to do business within this state of the kind on which the tax is imposed. The Minnesota Tax Commission shall enter on its records, the amount

of taxes found and determined by it to be due from any person, as hereinbefore provided, and on or before January 30th following, shall certify such amount to the State Auditor, who thereupon shall make his draft upon such person for the amount of taxes thus certified and place the same in the hands of the State Treasurer for collection. When such drafts have been placed by the State Auditor in the hands of the State Treasurer for collection, the State Treasurer shall mail, within 10 days, to the person from whom the tax is due, a written notice of the amount thereof and demand for its payment. The taxes shall be collected by and paid to the State Treasurer.

Sec. 9. Tax Commission may make assessment.—If any person required by this Act to file any return shall fail to do so within the time prescribed by this Act, or shall make, wilfully or otherwise, an incorrect, false or fraudulent return, he shall on the written demand of the Tax Commission file such return, or corrected return, within 30 days after the mailing to him of such written demand. If any person shall fail within said time to file such return, or corrected return, the Tax Commission shall make for him a return, or corrected return, from its own knowledge and from such information as it can obtain through testimony or otherwise, and assess a tax on the basis thereof, the amount of which tax (less payment theretofore made on account of such tax) shall be certified to the State Auditor.

Sec. 10. Unpaid tax to be collected by sheriff.—If any such draft remains unpaid for more than 60 days after demand has been made by the Treasurer for its payment, recovery may be had thereon in an action in the name of

the State in the same manner as if it were a debt due the State. Such tax may also be collected by having the State Auditor issue his warrant to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the taxpayer within the county, and to return such warrant to the State Auditor and pay to him the money collected by virtue thereof by a time to be therein specified, not less than 60 days from the date of the warrant. The sheriff shall proceed thereunder to levy upon and seize any property of the taxpayer within his county, and shall sell so much thereof as is required to satisfy such taxes and his costs, but such sales shall as to their manner be governed by the laws applicable to sales of like property on execution issued against property upon a judgment of a court of record. The sheriff shall make a return to the State Auditor and the proceeds of such sale less the sheriff's costs shall be turned over by the State Auditor to the State Treasurer who shall retain such part thereof as is required to satisfy the tax and costs and pay over any balance to the taxpayer. No suit shall lie to enjoin the collection of the taxes imposed by this Act.

Sec. 11. May recover back illegal tax.—A taxpayer who has paid, voluntarily or otherwise, or from whom there has been collected (other than by the method provided for in the first sentence of Section 10) an amount of tax for any year in excess of that legally due for such year, may recover the excess by an action of law against the state in any court of record, but such action shall be commenced within 2 years after the tax claimed to be excessive has been paid.

Sec. 12. Interest on unpaid taxes.—Taxes shall bear interest at the rate of one per cent per month during the period during which they remain unpaid. Said interest shall be collected in the same manner as hereinbefore provided for the collection of the taxes imposed by this Act.

Sec. 13. Violations a misdemeanor.—Any person liable to a tax imposed by this Act who shall fail to pay the same when payable, or who shall violate any other provision of this Act, imposing duties on him, shall be guilty of a misdemeanor.

Sec. 14. Tax Commission to administer act.—The Minnesota Tax Commission shall administer and enforce the assessment of the tax imposed by this Act. It may make and publish such rules and regulations, not inconsistent with this Act, as it may deem necessary in enforcing its provisions. It shall cause to be prepared blank forms for the returns required by this Act, and shall distribute the same throughout the State and furnish them on application, but failure to receive or secure them shall not relieve any person from the obligation of making any return required of him by this Act.

Sec. 15. Tax Commission may examine books.—For the purpose of determining the correctness of any return, or of determining whether or not any person should have made a return or paid tax hereunder, the Tax Commission shall have the power to examine or cause to be examined any books, papers, records, or memoranda relevant to making such determinations, whether such books, papers, rec-

ords of memoranda are the property of or in the possession of the taxpayer or any other person. It shall further have the power to require the attendance of any taxpayer or other person having knowledge or information relevant to such determinations aforementioned, to compel the production of books, papers, records or memoranda by persons so required to attend, to take testimony on matters material to such determinations, and to administer oaths or affirmations in any such connection. The Tax Commission is empowered at any time and from time to time to require any owner or manager of any store in the State of Minnesota to file with the Tax Commission, a statement under oath, showing the ownership, management and control of such store for the purpose of determining whether or not such store is subject to the tax hereby imposed. Such statement shall be in such form as the Tax Commission shall prescribe.

Sec. 16. Appropriation for expense.—There is hereby appropriated out of the moneys in the State Treasury, not otherwise appropriated, the sum of $10,000 for each of the fiscal years ending June 30, 1934, and June 30, 1935, respectively, which appropriation is hereby made to the State Tax Commission to be used by it for the purposes of collecting the tax provided for by this Act.

Sec. 17. Disposition of tax.—The revenue derived from taxes, interest, and fines provided for in this Act when collected is hereby appropriated for the purpose of being credited to the appropriation now annually made for aid to state high, graded, semi-graded, consolidated, industrial,

and rural schools, as now provided by law, to be distributed by the Department of Education in accordance with existing laws.

Sec. 18. Provisions separable.—If any part or provision of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not impair or invalidate any other part or provision in the remainder of the Act; and, if any part or provision of this Act shall for any reason be adjudged by any court of competent jurisdiction constitutionally inapplicable to any case or situation within the terms of such part or provision, such judgment shall not impair or invalidate such part or provision as applied to any other case or situation within their terms; and, if any exception from the tax hereby imposed shall for any reason be adjudged by any court of competent jurisdiction invalid, the tax shall be imposed upon the taxable subject as to whom or which such exception has thus been held invalid.

EXHIBIT "B"

EXTRA SESSION LAWS OF MINNESOTA FOR 1933-1934

Chapter 16.

An act to amend Laws 1933, Chapter 213, Section 11, and Mason's Minnesota Statutes of 1927, Section 49.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Recovery of over paid tax in certain cases.—That Section 11, Chapter 213 of Laws 1933 be and the same hereby is amended to read as follows:

"Sec. 11. A taxpayer who has paid, voluntarily or otherwise, or from whom there has been collected (other than by the method provided for in the first sentence of Section 10) any tax not legally due or any amount of tax in excess of that legally due may (1) file with the Tax Commission a claim for the refund of such tax or such excess and/or (2) recover the same by an action at law against the State in any court of record, but no such claim may be filed and no such action may be brought after the expiration of two years from the date of payment of the tax involved. If a taxpayer shall file with the Tax Commission a claim for refund hereunder, no action may be brought against the State to recover the tax included in such claim until said Commission has finally disposed thereof or has failed within six months after the filing of such claim to render final action thereon.

"If the Tax Commission finds that the tax for the refundment of which claim is filed was not legally due or pay-

able, it shall issue its certificate to the taxpayer for the refundment thereof, otherwise it shall disallow such claim.

"Any claim for refund allowed by the Tax Commission, and any judgment recovered against the State in an action to recover any such tax, shall include interest upon the tax refunded or recovered from the date of payment until the date of refundment or judgment at the rate of six (6) per cent per annum, and any such judgment shall bear a like rate of interest from date of entry until date of payment thereof.

"Any certificate for refundment issued by the Tax Commission hereunder or a certified copy of any judgment against the State recovered hereunder may be filed with the State Auditor, who shall thereupon issue his warrant on the State Treasurer for the amount thereof in favor of the payee of such certificate or judgment creditor, as the case may be, and it shall be the duty of the State Treasurer to pay all such warrants out of any funds in the state treasury not otherwise appropriated.

"There is hereby appropriated out of any funds at any time in the state treasury not otherwise appropriated (but not exceeding at any time the total amount of taxes to that time paid or collected under this act plus interest at the rate of six (6) per cent per annum on the amount of each payment of taxes from the date paid until refunded by order of the Tax Commission, or repaid pursuant to judgment recovered hereunder or until claim for refundment thereof and action for the recovery thereof are barred hereunder) such sum or sums as may be necessary from time to time to pay such refunds and judgments."

Sec. 2. Mason's Minnesota Statutes of 1927, Section 49 insofar as inconsistent herewith is hereby amended.

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